



**FILED**  
ALAMEDA COUNTY

MAR - 1 2013

By *Gracia Barlow*, Exec. Off/Clerk

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Attorneys for Defendants

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

MADALYN GARCIA, individually and on  
behalf of aggrieved employees pursuant to the  
Private Attorney's General Act ("PAGA"),

Plaintiff,

vs.

ELAN HOUSEHOLD, LLC, a Delaware  
limited liability company; LAURA BAXTER-  
SIMONS, an individual; and DOES 1-50,  
inclusive,

Defendants.

Case No. RG 13 662530

**DECLARATION OF MARGARET E.  
MURRAY IN SUPPORT OF  
DEFENDANTS' PETITION TO  
COMPEL ARBITRATION**

**Assigned For All Purposes To:  
Judge Bereola, Dept. 19**

Date: March 26, 2013  
Time: 9:00 a.m.  
Dept: 19

Reservation No. R-1370402

Complaint Filed: January 8, 2013  
Trial Date: None

I, MARGARET E. MURRAY, hereby declare:

1. I am counsel for the defendants in this action. I have personal and first-hand knowledge of the facts set forth in this declaration, and could and would competently testify to those facts if called as a witness herein.
2. Attached here to as Exhibit 1 is a true and correct copy of Plaintiff's counsel's February 14, 2013 email correspondence to me in which she declined my request that Plaintiff submit her claims in this case to arbitration.
3. Attached here to as Exhibit 2 is a true and correct copy of excerpts from the

DECLARATION OF MARGARET E. MURRAY IN SUPPORT OF DEFENDANTS' PETITION TO COMPEL ARBITRATION -- Case No. RG 13 662530

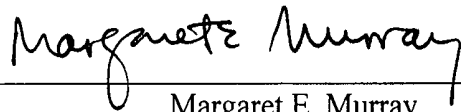
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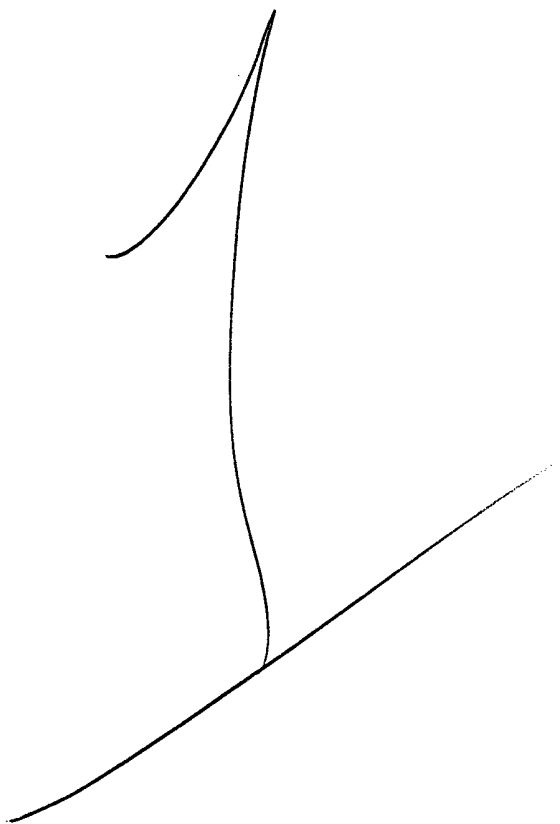
Judicial Arbitration and Mediation Services's rules governing arbitration in employment disputes.

4. Attached hereto as Exhibit 3 is a true and correct copy of excerpts from the American Arbitration Association's rules governing arbitration in employment disputes.

5. Attached hereto as Exhibit 4 is a true and correct copy of the first page of the Spanish version of the American Arbitration Association's rules governing arbitration in employment disputes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I executed this declaration on February 28, 2013 in San Francisco, California.

  
Margaret E. Murray

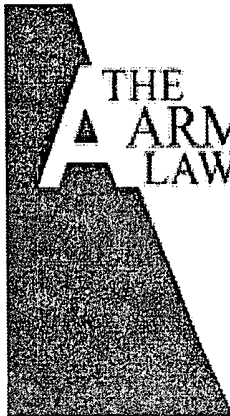


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**Subject:** RE: Garcia/Elan Household  
**From:** Kelly Armstrong <kelly@thearmstronglawfirm.com>  
**Date:** Thu, Feb 14, 2013 11:10 am  
**To:** "margaret@memlawsf.com" <margaret@memlawsf.com>  
**Cc:** Ingrid Evans <ingrid@evanslaw.com>  
**Attach:** image001.png

Margaret,

We intend to oppose a motion to compel arbitration. We will agree to stay the discovery pending the determination so long as you agree that you will respond to it within 20 days of a the court's decision. Please confirm your acceptance.



Kelly Armstrong  
Attorney at Law

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**From:** margaret@memlawsf.com [mailto:margaret@memlawsf.com]  
**Sent:** Wednesday, February 13, 2013 2:21 PM  
**To:** Kelly Armstrong  
**Cc:** Ingrid Evans  
**Subject:** Garcia/Elan Household

Please see the attached letter of today's date.

Best regards,

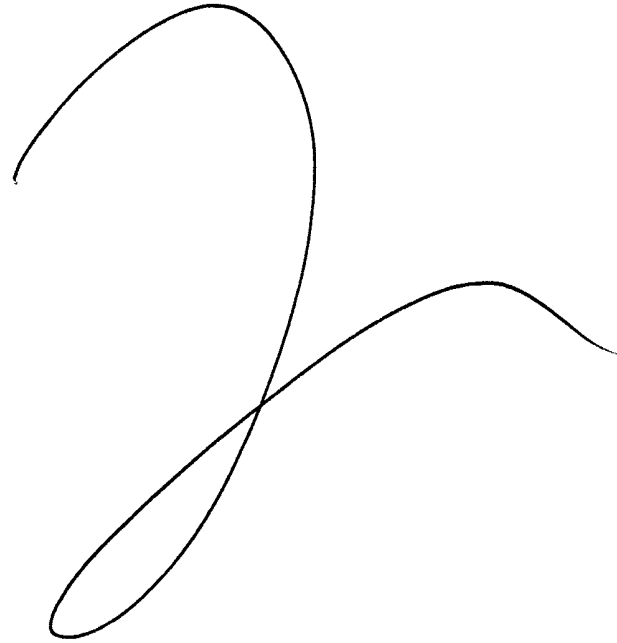
Margaret

Margaret E. Murray  
Law Offices of Margaret E. Murray  
*Celebrating Twenty-Five Years of Law Practice and  
Five Years of MEMLAW, Serving Wonderful Clients  
Thank you!*

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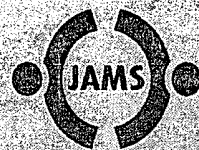
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**JAMS  
EMPLOYMENT  
ARBITRATION  
RULES &  
PROCEDURES**

**EFFECTIVE JULY 15, 2009**

**THE RESOLUTION EXPERTS**



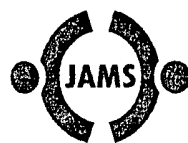
# JAMS EMPLOYMENT ARBITRATION RULES & PROCEDURES

JAMS provides arbitration and mediation services from Resolution Centers located throughout the United States. Its arbitrators and mediators hear and resolve some of the nation's largest, most complex and contentious disputes, utilizing JAMS Rules & Procedures as well as the rules of other domestic and international arbitral institutions.

JAMS arbitrators and mediators are full-time neutrals who come from the ranks of retired state and federal judges and prominent attorneys. These highly trained and experienced ADR professionals are dedicated to the highest ethical standards of conduct.

Parties wishing to write a pre-dispute JAMS arbitration clause into their agreement should review the sample arbitration clauses on Page 4. These clauses may be modified to tailor the arbitration process to meet the parties' individual needs.

THE RESOLUTION EXPERTS





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## SAMPLE CLAUSES FOR USE IN EMPLOYMENT DISPUTE RESOLUTION PROGRAMS AND CONTRACTS

The following are basic sample clauses providing for mediation or arbitration in an employment contract. A variety of issues may affect the enforceability or effectiveness of these sample clauses; therefore, it is recommended that you review applicable law in your jurisdiction and consult experienced counsel for advice. The information contained herein should not be considered legal advice or legal opinion. For information about setting a case, call your local JAMS office at 1-800-352-5267.

### Sample Clause for Mediation Only

*Any controversy, dispute or claim arising out of or relating to this [contract] or breach thereof shall first be settled through good faith negotiation [OR company employment program] [other]. If the dispute cannot be settled through negotiation [OR company employment program] [other], the parties agree to attempt in good faith to settle the dispute by mediation administered by JAMS.*

### Sample Clause for Mediation and Arbitration

*Any controversy, dispute or claim arising out of or relating to this [contract] or breach thereof shall first be settled through good faith negotiation [OR company employment program] [other]. If the dispute cannot be settled through negotiation [OR company employment program] [other], the parties agree to attempt in good faith to settle the dispute by mediation administered by JAMS. If the parties are unsuccessful at resolving the dispute through mediation, the parties agree to [binding] arbitration administered by JAMS pursuant to its Employment Arbitration Rules & Procedures and subject to JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness. Judgment on the Award may be entered in any court having jurisdiction.*

## CASE MANAGEMENT FEES

JAMS charges a nominal Case Management Fee. For arbitrations the Case Management Fee is:

HEARING LENGTH	FEE
1 to 3 days . . . . .	\$400 per party, per day (1 day is defined as 10 hours of professional time)
Time in excess of initial 30 hours . . . . .	10% of professional fees

JAMS neutrals set their own hourly, partial and full-day rates. For information on individual neutrals' rates and the Case Management Fee, please contact JAMS at 800-352-JAMS. The Case Management Fee structure is subject to change.

All of the JAMS Rules, including the Employment Arbitration Rules set forth below, can be accessed at the JAMS website: [www.jamsadr.com](http://www.jamsadr.com).

# JAMS EMPLOYMENT ARBITRATION RULES & PROCEDURES

*NOTICE: These Rules are the copyrighted property of JAMS. They cannot be copied, reprinted or used in any way without permission of JAMS, unless they are being used by the parties to an arbitration as the rules for that arbitration. If they are being used as the rules for an arbitration, proper attribution must be given to JAMS. If you wish to obtain permission to use our copyrighted materials, please contact JAMS at 949-224-1810.*

## Rule 1. Scope of Rules

(a) The JAMS Employment Arbitration Rules & Procedures ("Rules") govern binding Arbitrations of disputes or claims that are administered by JAMS and in which the Parties agree to use these Rules or, in the absence of such agreement, the disputes or claims are employment-related, unless other Rules are prescribed.

(b) The Parties shall be deemed to have made these Rules a part of their Arbitration agreement ("Agreement") whenever they have provided for Arbitration by JAMS under its Employment Rules or for Arbitration by JAMS without specifying any particular JAMS Rules and the disputes or claims meet the criteria of the first paragraph of this Rule.

(c) The authority and duties of JAMS are prescribed in the Agreement of the Parties and in these Rules, and may be carried out through such representatives as it may direct.

(d) JAMS may, in its discretion, assign the administration of an Arbitration to any of its Resolution Centers.

(e) The term "Party" as used in these Rules includes Parties to the Arbitration and their counsel or representatives.

(f) "Electronic filing" (e-file) means the electronic transmission of documents to and from JAMS and other Parties for the purpose of filing via the Internet. "Electronic service" (e-service) means the electronic transmission of documents via JAMS Electronic Filing System to a party, attorney or representative under these Rules.

## Rule 2. Party-Agreed Procedures

The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies including, without limitation, the JAMS Policy on Employment Arbitration Minimum Standards of Procedural Fairness, and Rules 15(i), 30 and 31. The Parties shall promptly notify JAMS of any such Party-agreed procedures and shall confirm such procedures in writing. The Party-agreed procedures shall be enforceable as if contained in these Rules.

## Rule 3. Amendment of Rules

JAMS may amend these Rules without notice. The Rules in effect on the date of the commencement of an Arbitration (as defined in Rule 5) shall apply to that Arbitration, unless the Parties have agreed upon another version of the Rules.

## Rule 4. Conflict with Law

If any of these Rules, or modification of these Rules agreed on by the Parties, is determined to be in conflict with a provision of applicable law, the provision of law will govern over the Rule in conflict, and no other Rule will be affected.

## Rule 5. Commencing an Arbitration

(a) The Arbitration is deemed commenced when JAMS confirms in a Commencement Letter its receipt of one of the following:

(i) A post-dispute Arbitration agreement fully executed by all Parties and that specifies JAMS administration or use of any JAMS Rules; or

(ii) A pre-dispute written contractual provision requiring the Parties to arbitrate the employment dispute or claim and which specifies JAMS administration or use of any JAMS Rules or which the Parties agree shall be administered by JAMS; or

(iii) A written confirmation of an oral agreement of all Parties to participate in an Arbitration administered by JAMS or conducted pursuant to any JAMS Rules; or

(iv) A copy of a court order compelling Arbitration at JAMS.

(b) The Commencement Letter shall confirm which one of the above requirements for commencement has been met, that JAMS has received all payments required under the applicable fee schedule, and that the claimant has

provided JAMS with contact information for all Parties along with evidence that the Demand has been served on all Parties.

(c) If a Party that is obligated to arbitrate in accordance with subparagraph (a) of this Rule fails to agree to participate in the Arbitration process, JAMS shall confirm in writing that Party's failure to respond or participate and, pursuant to Rule 19, the Arbitrator, once appointed, shall schedule, and provide appropriate notice of a Hearing or other opportunity for the Party demanding the Arbitration to demonstrate its entitlement to relief.

(d) The date of commencement of the Arbitration is the date of the Commencement Letter, but it is not intended to be applicable to any legal requirements such as the statute of limitations, any contractual limitations period, or claims notice requirements. The term "commencement" as used in this Rule is intended only to pertain to the operation of this and other rules (such as Rule 3, 9(a), 9(c), 13(a), 17(a), 31(a).)

## **Rule 6. Preliminary and Administrative Matters**

(a) JAMS may convene, or the Parties may request, administrative conferences to discuss any procedural matter relating to the administration of the Arbitration.

(b) If no Arbitrator has yet been appointed, at the request of a Party and in the absence of Party agreement, JAMS may determine the location of the Hearing, subject to Arbitrator review. In determining the location of the Hearing, such factors as the subject matter of the dispute, the convenience of the Parties and witnesses and the relative resources of the Parties shall be considered, but in no event will the Hearing be scheduled in a location that precludes attendance by the Employee.

(c) If, at any time, any Party has failed to pay fees or expenses in full, JAMS may order the suspension or termination of the proceedings. JAMS may so inform the Parties in order that one of them may advance the required payment. If one Party advances the payment owed by a non-paying Party, the Arbitration shall proceed and the Arbitrator may allocate the non-paying Party's share of such costs, in accordance with Rules 24(f) and 31(c). An

administrative suspension shall toll any other time limits contained in these Rules or the Parties' Agreement.

(d) JAMS does not maintain an official record of documents filed in the Arbitration. If the Parties wish to have any documents returned to them, they must advise JAMS in writing within 30 days of the conclusion of the Arbitration. If special arrangements are required regarding file maintenance or document retention, they must be agreed to in writing and JAMS reserves the right to impose an additional fee for such special arrangements. Documents that are submitted for e-filing are retained for 30 days following the conclusion of the Arbitration.

(e) Unless the Parties' agreement or applicable law provides otherwise, JAMS, if it determines that the Arbitrations so filed have common issues of fact or law, may consolidate Arbitrations in the following instances:

(i) If a Party files more than one Arbitration with JAMS, JAMS may consolidate the Arbitrations into a single arbitration.

(ii) Where a Demand or Demands for Arbitration is or are submitted naming Parties already involved in another Arbitration or Arbitrations pending under these Rules, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

(iii) Where a Demand or Demands for Arbitration is or are submitted naming parties that are not identical to the Parties in the existing Arbitration or Arbitrations, JAMS may decide that the new case or cases shall be consolidated into one or more of the pending proceedings and referred to one of the Arbitrators or panels of Arbitrators already appointed.

When rendering its decision, JAMS will take into account all circumstances, including the links between the cases and the progress already made in the existing Arbitrations.

Unless applicable law provides otherwise, where JAMS decides to consolidate a proceeding into a pending Arbitration, the Parties to the consolidated case or cases will be deemed to have waived their right to designate an Arbitrator as well as any contractual provision with respect to the site of the Arbitration.

(f) Where a third party seeks to participate in an Arbitration already pending under these Rules or where a Party to an Arbitration under these Rules seeks to compel a third party to participate in a pending Arbitration, the Arbitrator shall determine such request, taking into account all circumstances the Arbitrator deems relevant and applicable.

### **Rule 7. Number of Arbitrators and Appointment of Chairperson**

(a) The Arbitration shall be conducted by one neutral Arbitrator unless all Parties agree otherwise. In these Rules, the term "Arbitrator" shall mean, as the context requires, the Arbitrator or the panel of Arbitrators in a tripartite Arbitration.

(b) In cases involving more than one Arbitrator the Parties shall agree on, or in the absence of agreement JAMS shall designate, the Chairperson of the Arbitration Panel. If the Parties and the Arbitrators agree, a single member of the Arbitration Panel may, acting alone, decide discovery and procedural matters, including the conduct of hearings to receive documents and testimony from third parties who have been subpoenaed to produce documents.

(c) Where the Parties have agreed that each Party is to name one Arbitrator, the Arbitrators so named shall be neutral and independent of the appointing Party unless the Parties have agreed that they shall be non-neutral.

### **Rule 8. Service**

(a) The Arbitrator may at any time require electronic filing and service of documents in an Arbitration. If an Arbitrator requires electronic filing, the Parties shall maintain and regularly monitor a valid, usable and live email address for the receipt of all documents filed through JAMS Electronic Filing System. Any document filed electronically shall be considered as filed with JAMS when the transmission to JAMS Electronic Filing System is complete. Any document e-filed by 11:59 p.m. (of the sender's time zone) shall be deemed filed on that date. Upon completion of filing, JAMS Electronic Filing System shall issue a confirmation receipt that includes the date and time of receipt. The confirmation receipt shall serve as proof of filing.

(b) Every document filed with JAMS Electronic Filing System shall be deemed to have been signed by the Arbi-

trator, Case Manager, attorney or declarant who submits the document to JAMS Electronic Filing System, and shall bear the typed name, address, telephone number, and Bar number of a signing attorney. Documents containing signatures of third-parties (i.e., unopposed motions, affidavits, stipulations, etc.) may also be filed electronically by indicating that the original signatures are maintained by the filing Party in paper-format.

(c) Delivery of e-service documents through JAMS Electronic Filing System to other registered users shall be considered as valid and effective service and shall have the same legal effect as an original paper document. Recipients of e-service documents shall access their documents through JAMS Electronic Filing System. E-service shall be deemed complete when the party initiating e-service completes the transmission of the electronic document(s) to JAMS Electronic Filing System for e-filing and/or e-service. Upon actual or constructive receipt of the electronic document(s) by the party to be served, a Certificate of Electronic Service shall be issued by JAMS Electronic Filing System to the party initiating e-service and that Certificate shall serve as proof of service. Any party who ignores or attempts to refuse e-service shall be deemed to have received the electronic document(s) 72 hours following the transmission of the electronic document(s) to JAMS Electronic Filing System.

(d) If an electronic filing or service does not occur because of (1) an error in the transmission of the document to JAMS Electronic Filing System or served Party which was unknown to the sending Party, (2) a failure to process the electronic document when received by JAMS Electronic Filing System, (3) the Party was erroneously excluded from the service list, or (4) other technical problems experienced by the filer, the Arbitrator or JAMS may for good cause shown permit the document to be filed *nunc pro tunc* to the date it was first attempted to be sent electronically. Or, in the case of service, the Party shall, absent extraordinary circumstances, be entitled to an order extending the date for any response or the period within which any right, duty or other act must be performed.

(e) For documents that are not filed electronically, service by a Party under these Rules is effected by providing one signed copy of the document to each Party and two copies in the case of a sole Arbitrator and four copies in the case of a tripartite panel to JAMS. Service may be made

by hand-delivery, overnight delivery service or U.S. mail. Service by any of these means is considered effective upon the date of deposit of the document. Service by electronic mail or facsimile transmission is considered effective upon transmission, but only if followed within one week of delivery by service of an appropriate number of copies and originals by one of the other service methods.

In computing any period of time prescribed or allowed by these Rules for a Party to do some act within a prescribed period after the service of a notice or other paper on the Party and the notice or paper is served on the Party only by U.S. Mail, three (3) calendar days shall be added to the prescribed period.

### **Rule 9. Notice of Claims**

(a) Each Party shall afford all other Parties reasonable and timely notice of its claims, affirmative defenses or counterclaims. Any such notice shall include a short statement of its factual basis. No claim, remedy, counterclaim, or affirmative defense will be considered by the Arbitrator in the absence of such prior notice to the other Parties, unless the Arbitrator determines that no Party has been unfairly prejudiced by such lack of formal notice or all Parties agree that such consideration is appropriate notwithstanding the lack of prior notice.

(b) Within fourteen (14) calendar days after the commencement of an Arbitration, Claimant shall submit to JAMS and serve on the other Parties a notice of its claim and remedies sought. Such notice shall consist of either a Demand for Arbitration or a copy of a Complaint previously filed with a court. (In the latter case, Claimant may accompany the Complaint with a copy of any Answer to that Complaint filed by any Respondent.)

(c) Within fourteen (14) calendar days of service of the notice of claim, a Respondent may submit to JAMS and serve on other Parties a response and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) or counterclaims it may have.

(d) Within fourteen (14) calendar days of service of a counterclaim, a claimant may submit to JAMS and serve on other Parties a response to such counterclaim and must so submit and serve a statement of any affirmative defenses (including jurisdictional challenges) it may have.

(e) Any claim or counterclaim to which no response has been served will be deemed denied.

### **Rule 10. Changes of Claims**

After the filing of a claim and before the Arbitrator is appointed, any Party may make a new or different claim against a Party or any third Party that is subject to Arbitration in the proceeding. Such claim shall be made in writing, filed with JAMS and served on the other Parties. Any response to the new claim shall be made within fourteen (14) calendar days after service of such claim. After the Arbitrator is appointed, no new or different claim may be submitted except with the Arbitrator's approval. A Party may request a Hearing on this issue. Each Party has the right to respond to any new or amended claim in accordance with Rule 9(d).

### **Rule 11. Interpretation of Rules and Jurisdictional Challenges**

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Whenever in these Rules a matter is to be determined by "JAMS" (such as in Rules 6; 11 (d); 15(d), (f), (g) or (i)), such determination shall be made in accordance with JAMS administrative procedures.

(c) Jurisdictional and arbitrability disputes, including disputes over the formation, existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. Unless the relevant law requires otherwise, the Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(d) Disputes concerning the appointment of the Arbitrator shall be resolved by JAMS.

(e) The Arbitrator may, upon a showing of good cause or *sua sponte*, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may only be altered in accordance with Rules 22(i) or 24.

## Rule 12. Representation

(a) The Parties may be represented by counsel or any other person of the Party's choice. Each Party shall give prompt written notice to the Case Manager and the other Parties of the name, address, telephone and fax numbers, and email address of its representative. The representative of a Party may act on the Party's behalf in complying with these Rules.

(b) Changes in Representation. A Party shall give prompt written notice to the Case Manager and the other Parties of any change in its representation, including the name, address, telephone and fax numbers, and email address of the new representative. Such notice shall state that the written consent of the former representative, if any, and of the new representative, has been obtained and shall state the effective date of the new representation.

## Rule 13. Withdrawal from Arbitration

(a) No Party may terminate or withdraw from an Arbitration after the issuance of the Commencement Letter (see Rule 5) except by written agreement of all Parties to the Arbitration.

(b) A Party that asserts a claim or counterclaim may unilaterally withdraw that claim or counterclaim without prejudice by serving written notice on the other Parties and on the Arbitrator. However, the opposing Parties may, within fourteen (14) calendar days of service of notice of the withdrawal of the claim or counterclaim, request that the Arbitrator order that the withdrawal be with prejudice. If such a request is made, it shall be determined by the Arbitrator.

## Rule 14. Ex Parte Communications

(a) No Party may have any *ex parte* communication with a neutral Arbitrator jointly selected by the Parties. The Arbitrator(s) may authorize any Party to communicate directly with the Arbitrator(s) by email or other written correspondence, so long as copies are simultaneously forwarded to the JAMS Case Manager and the other Parties.

(b) A Party may have *ex parte* communication with its appointed neutral or non-neutral Arbitrator as necessary to secure the Arbitrator's services and to assure the absence

of conflicts and in connection with the selection of the Chairperson of the arbitral panel.

(c) The Parties may agree to permit more extensive *ex parte* communication between a Party and a non-neutral Arbitrator. More extensive communications with a non-neutral arbitrator may also be permitted by applicable law and rules of ethics.

## Rule 15. Arbitrator Selection and Replacement

(a) Unless the Arbitrator has been previously selected by agreement of the Parties, JAMS may attempt to facilitate agreement among the Parties regarding selection of the Arbitrator.

(b) If the Parties do not agree on an Arbitrator, JAMS shall send the Parties a list of at least five (5) Arbitrator candidates in the case of a sole Arbitrator and ten (10) Arbitrator candidates in the case of a tripartite panel. JAMS shall also provide each Party with a brief description of the background and experience of each Arbitrator candidate. JAMS may replace any or all names on the list of Arbitrator candidates for reasonable cause at any time before the Parties have submitted their choice pursuant to subparagraph (c) below.

(c) Within seven (7) calendar days of service by the Parties of the list of names, each Party may strike two (2) names in the case of a sole Arbitrator and three (3) names in the case of a tripartite panel, and shall rank the remaining Arbitrator candidates in order of preference. The remaining Arbitrator candidate with the highest composite ranking shall be appointed the Arbitrator. JAMS may grant a reasonable extension of the time to strike and rank the Arbitrator candidates to any Party without the consent of the other Parties.

(d) If this process does not yield an Arbitrator or a complete panel, JAMS shall designate the sole Arbitrator or as many members of the tripartite panel as are necessary to complete the panel.

(e) If a Party fails to respond to a list of Arbitrator candidates within seven (7) calendar days after its service, JAMS shall deem that Party to have accepted all of the Arbitrator candidates.

(f) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for purposes of the Arbitrator selection process. JAMS shall determine whether the interests between entities are adverse for purposes of Arbitrator selection, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

(g) If, for any reason, the Arbitrator who is selected is unable to fulfill the Arbitrator's duties, a successor Arbitrator shall be chosen in accordance with this Rule. If a member of a panel of Arbitrators becomes unable to fulfill his or her duties after the beginning of a Hearing but before the issuance of an Award, a new Arbitrator will be chosen in accordance with this Rule unless, in the case of a tripartite panel, the Parties agree to proceed with the remaining two Arbitrators. JAMS will make the final determination as to whether an Arbitrator is unable to fulfill his or her duties, and that decision shall be final.

(h) Any disclosures regarding the selected Arbitrator shall be made as required by law or within ten (10) calendar days from the date of appointment. The obligation of the Arbitrator to make all required disclosures continues throughout the Arbitration process. Such disclosures may be provided in electronic format, provided that JAMS will produce a hard copy to any Party that requests it.

(i) At any time during the Arbitration process, a Party may challenge the continued service of an Arbitrator for cause. The challenge must be based upon information that was not available to the Parties at the time the Arbitrator was selected. A challenge for cause must be in writing and exchanged with opposing Parties who may respond within seven (7) days of service of the challenge. JAMS shall make the final determination as to such challenge. Such determination shall take into account the materiality of the facts and any prejudice to the Parties. That decision will be final.

(j) Where the Parties have agreed that a Party-appointed Arbitrator is to be non-neutral, that Party-appointed Arbitrator is not obliged to withdraw if requested to do so only by the party who did not appoint that Arbitrator.

## **Rule 16. Preliminary Conference**

At the request of any Party or at the direction of the Arbitrator, a Preliminary Conference shall be conducted with the Parties or their counsel or representatives. The Preliminary Conference may address any or all of the following subjects:

- (a) The exchange of information in accordance with Rule 17 or otherwise;
- (b) The schedule for discovery as permitted by the Rules, as agreed by the Parties or as required or authorized by applicable law;
- (c) The pleadings of the Parties and any agreement to clarify or narrow the issues or structure the Arbitration Hearing;
- (d) The scheduling of the Hearing and any pre-Hearing exchanges of information, exhibits, motions or briefs;
- (e) The attendance of witnesses as contemplated by Rule 21;
- (f) The scheduling of any dispositive motion pursuant to Rule 18;
- (g) The premarking of exhibits; preparation of joint exhibit lists and the resolution of the admissibility of exhibits;
- (h) The form of the Award; and
- (i) Such other matters as may be suggested by the Parties or the Arbitrator.

The Preliminary Conference may be conducted telephonically and may be resumed from time to time as warranted.

## **Rule 17. Exchange of Information**

(a) The Parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information (including electronically stored information ("ESI")) relevant to the dispute or claim immediately after commencement of the Arbitration. They shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control on which



they rely in support of their positions, names of individuals whom they may call as witnesses at the Arbitration Hearing, and names of all experts who may be called to testify at the Arbitration Hearing, together with each expert's report that may be introduced at the Arbitration Hearing, within twenty-one (21) calendar days after all pleadings or notice of claims have been received. The Arbitrator may modify these obligations at the Preliminary Conference.

(b) Each Party may take at least one deposition of an opposing Party or an individual under the control of the opposing Party. The Parties shall attempt to agree on the number, time, location, and duration of the deposition(s). Absent agreement, the Arbitrator shall determine these issues including whether to grant a request for additional depositions, based upon the reasonable need for the requested information, the availability of other discovery, and the burdensomeness of the request on the opposing Parties and witness.

(c) As they become aware of new documents or information, including experts who may be called upon to testify, all Parties continue to be obligated to provide relevant, non-privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the Parties regarding documents or information to be exchanged. Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the Hearing, unless agreed by the Parties or upon a showing of good cause.

(d) The Parties shall promptly notify JAMS when a dispute exists regarding discovery issues. A conference shall be arranged with the Arbitrator, either by telephone or in person, and the Arbitrator shall decide the dispute. With the written consent of all Parties, and in accordance with an agreed written procedure, the Arbitrator may appoint a special master to assist in resolving a discovery dispute.

### **Rule 18. Summary Disposition of a Claim or Issue**

The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to respond to the motion.

### **Rule 19. Scheduling and Location of Hearing**

(a) The Arbitrator, after consulting with the Parties that have appeared, shall determine the date, time and location of the Hearing. The Arbitrator and the Parties shall attempt to schedule consecutive Hearing days if more than one day is necessary.

(b) If a Party has failed to participate in the Arbitration process, and the Arbitrator reasonably believes that the Party will not participate in the Hearing, the Arbitrator may set the Hearing without consulting with that Party. The non-participating Party shall be served with a Notice of Hearing at least thirty (30) calendar days prior to the scheduled date unless the law of the relevant jurisdiction allows for or the Parties have agreed to shorter notice.

(c) The Arbitrator, in order to hear a third party witness, or for the convenience of the Parties or the witnesses, may conduct the Hearing at any location. Any JAMS Resolution Center may be designated a Hearing location for purposes of the issuance of a subpoena or subpoena *duces tecum* to a third party witness.

### **Rule 20. Pre-Hearing Submissions**

(a) Except as set forth in any scheduling order that may be adopted, at least fourteen (14) calendar days before the Arbitration Hearing, the Parties shall file with JAMS and serve and exchange (1) a list of the witnesses they intend to call, including any experts, (2) a short description of the anticipated testimony of each such witness and an estimate of the length of the witness' direct testimony, and (3) a list of all exhibits intended to be used at the Hearing. The Parties should exchange with each other a copy of any such exhibits to the extent that it has not been previously exchanged. The Parties should pre-mark exhibits and shall attempt to resolve any disputes regarding the admissibility of exhibits prior to the Hearing.

(b) The Arbitrator may require that each Party submit concise written statements of position, including summaries of the facts and evidence a Party intends to present, discussion of the applicable law and the basis for the requested Award or denial of relief sought. The statements, which may be in the form of a letter, shall be filed with JAMS and served upon the other Parties, at least seven (7) calendar days before the Hearing date. Rebuttal statements or

other pre-Hearing written submissions may be permitted or required at the discretion of the Arbitrator.

### **Rule 21. Securing Witnesses and Documents for the Arbitration Hearing**

At the written request of a Party, all other Parties shall produce for the Arbitration Hearing all specified witnesses in their employ or under their control without need of subpoena. The Arbitrator may issue subpoenas for the attendance of witnesses or the production of documents either prior to or at the Hearing pursuant to this Rule or Rule 19(c). The subpoena or subpoena *duces tecum* shall be issued in accordance with the applicable law. Pre-issued subpoenas may be used in jurisdictions that permit them. In the event a Party or a subpoenaed person objects to the production of a witness or other evidence, the Party or subpoenaed person may file an objection with the Arbitrator, who shall promptly rule on the objection, weighing both the burden on the producing Party and witness and the need of the proponent for the witness or other evidence.

### **Rule 22. The Arbitration Hearing**

(a) The Arbitrator will ordinarily conduct the Arbitration Hearing in the manner set forth in these Rules. The Arbitrator may vary these procedures if it is determined reasonable and appropriate to do so. It is expected that the Employee will attend the Arbitration Hearing, as will any other individual Party with information about a significant issue.

(b) The Arbitrator shall determine the order of proof, which will generally be similar to that of a court trial.

(c) The Arbitrator shall require witnesses to testify under oath if requested by any Party, or otherwise in the discretion of the Arbitrator.

(d) Strict conformity to the rules of evidence is not required, except that the Arbitrator shall apply applicable law relating to privileges and work product. The Arbitrator shall consider evidence that he or she finds relevant and material to the dispute, giving the evidence such weight as is appropriate. The Arbitrator may be guided in that determination by principles contained in the Federal Rules of Evidence or any other applicable rules of evidence. The Arbitrator may limit testimony to exclude evidence that

would be immaterial or unduly repetitive, provided that all Parties are afforded the opportunity to present material and relevant evidence.

(e) The Arbitrator shall receive and consider relevant deposition testimony recorded by transcript or videotape, provided that the other Parties have had the opportunity to attend and cross-examine. The Arbitrator may in his or her discretion consider witness affidavits or other recorded testimony even if the other Parties have not had the opportunity to cross-examine, but will give that evidence only such weight as the Arbitrator deems appropriate.

(f) The Parties will not offer as evidence, and the Arbitrator shall neither admit into the record nor consider, prior settlement offers by the Parties or statements or recommendations made by a mediator or other person in connection with efforts to resolve the dispute being arbitrated, except to the extent that applicable law permits the admission of such evidence.

(g) The Hearing or any portion thereof may be conducted telephonically with the agreement of the Parties or in the discretion of the Arbitrator.

(h) When the Arbitrator determines that all relevant and material evidence and arguments have been presented, and any interim or partial awards have been issued, the Arbitrator shall declare the Hearing closed. The Arbitrator may defer the closing of the Hearing until a date agreed upon by the Arbitrator and the Parties, to permit the Parties to submit post-Hearing briefs, which may be in the form of a letter, and/or to make closing arguments. If post-Hearing briefs are to be submitted, or closing arguments are to be made, the Hearing shall be deemed closed upon receipt by the Arbitrator of such briefs or at the conclusion of such closing arguments.

(i) At any time before the Award is rendered, the Arbitrator may, *sua sponte* or on application of a Party for good cause shown, re-open the Hearing. If the Hearing is re-opened and the re-opening prevents the rendering of the Award within the time limits specified by these Rules, the time limits will be extended until the reopened Hearing is declared closed by the Arbitrator.

(j) The Arbitrator may proceed with the Hearing in the absence of a Party that, after receiving notice of the Hearing pursuant to Rule 19, fails to attend. The Arbitrator may

not render an Award solely on the basis of the default or absence of the Party, but shall require any Party seeking relief to submit such evidence as the Arbitrator may require for the rendering of an Award. If the Arbitrator reasonably believes that a Party will not attend the Hearing, the Arbitrator may schedule the Hearing as a telephonic Hearing and may receive the evidence necessary to render an Award by affidavit. The notice of Hearing shall specify if it will be in person or telephonic.

(k) (i) Any Party may arrange for a stenographic or other record to be made of the Hearing and shall inform the other Parties in advance of the Hearing. The requesting Party shall bear the cost of such stenographic record. If all other Parties agree to share the cost of the stenographic record, it shall be made available to the Arbitrator and may be used in the proceeding.

(ii) If there is no agreement to share the cost, the stenographic record may not be provided to the Arbitrator and may not be used in the proceeding unless the Party arranging for the stenographic record either agrees to provide access to the stenographic record at no charge or on terms that are acceptable to the Parties and the reporting service.

(iii) If the Parties agree to an Optional Arbitration Appeal Procedure (see Rule 34), they shall ensure that a stenographic or other record is made of the Hearing.

(iv) The Parties may agree that the cost of the stenographic record shall or shall not be allocated by the Arbitrator in the Award.

### **Rule 23. Waiver of Hearing**

The Parties may agree to waive the oral Hearing and submit the dispute to the Arbitrator for an Award based on written submissions and other evidence as the Parties may agree.

### **Rule 24. Awards**

(a) The Arbitrator shall render a Final Award or a Partial Final Award within thirty (30) calendar days after the date of the close of the Hearing as defined in Rule 22(h) or, if a Hearing has been waived, within thirty (30) calendar days after the receipt by the Arbitrator of all materials specified by the Parties, except (i) by the agreement of the Parties, (ii) upon good cause for an extension of time to render the Award, or (iii) as provided in Rule 22(i). The Arbitrator

shall provide the Final Award or the Partial Final Award to JAMS for issuance in accordance with this Rule.

(b) Where a panel of Arbitrators has heard the dispute, the decision and Award of a majority of the panel shall constitute the Arbitration Award.

(c) In determining the merits of the dispute the Arbitrator shall be guided by the rules of law agreed upon by the Parties. In the absence of such agreement, the Arbitrator will be guided by the law or the rules of law that the Arbitrator deems to be most appropriate. The Arbitrator may grant any remedy or relief that is just and equitable and within the scope of the Parties' agreement, including but not limited to specific performance of a contract or any other equitable or legal remedy.

(d) In addition to a Final Award or Partial Final Award, the Arbitrator may make other decisions, including interim or partial rulings, orders and Awards.

(e) Interim Measures. The Arbitrator may grant whatever interim measures are deemed necessary, including injunctive relief and measures for the protection or conservation of property and disposition of disposable goods. Such interim measures may take the form of an interim Award, and the Arbitrator may require security for the costs of such measures. Any recourse by a Party to a court for interim or provisional relief shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

(f) The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses unless such an allocation is expressly prohibited by the Parties' agreement or by applicable law. (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c)).

(g) The Award of the Arbitrator may allocate attorneys' fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' agreement or allowed by applicable law.

(h) The Award will consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. The Award shall also contain a concise written statement of the reasons for the

Award, stating the essential findings and conclusions on which the award is based. The Parties may agree to any other form of award, unless the arbitration is based on an arbitration agreement that is required as a condition of employment.

(i) After the Award has been rendered, and provided the Parties have complied with Rule 31, the Award shall be issued by serving copies on the Parties. Service may be made by U.S. Mail. It need not be sent certified or registered.

(j) Within seven (7) calendar days after service of the Award by JAMS, any Party may serve upon the other Parties and on JAMS a request that the Arbitrator correct any computational, typographical or other similar error in an Award (including the reallocation of fees pursuant to Rule 31), or the Arbitrator may *sua sponte* propose to correct such errors in an Award. A Party opposing such correction shall have seven (7) calendar days thereafter in which to file any objection. The Arbitrator may make any necessary and appropriate correction to the Award within twenty-one (21) calendar days of receiving a request or fourteen (14) calendar days after the Arbitrator's proposal to do so. The Arbitrator may extend the time within which to make corrections upon good cause. The corrected Award shall be served upon the Parties in the same manner as the Award.

(k) The Award is considered final, for purposes of either an Optional Arbitration Appeal Procedure pursuant to Rule 34 or a judicial proceeding to enforce, modify or vacate the Award pursuant to Rule 25, fourteen (14) calendar days after service is deemed effective if no request for a correction is made, or as of the effective date of service of a corrected Award.

#### **Rule 25. Enforcement of the Award**

Proceedings to enforce, confirm, modify or vacate an Award will be controlled by and conducted in conformity with the Federal Arbitration Act, 9 U.S.C. Sec 1 *et seq.* or applicable state law. The Parties to an Arbitration under these Rules shall be deemed to have consented that judgment upon the Award may be entered in any court having jurisdiction thereof.

#### **Rule 26. Confidentiality and Privacy**

(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

(b) The Arbitrator may issue orders to protect the confidentiality of proprietary information, trade secrets or other sensitive information.

(c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing.

#### **Rule 27. Waiver**

(a) If a Party becomes aware of a violation of or failure to comply with these Rules and fails promptly to object in writing, the objection will be deemed waived, unless the Arbitrator determines that waiver will cause substantial injustice or hardship.

(b) If any Party becomes aware of information that could be the basis of a challenge for cause to the continued service of the Arbitrator, such challenge must be made promptly, in writing, to the Arbitrator or JAMS. Failure to do so shall constitute a waiver of any objection to continued service by the Arbitrator.

#### **Rule 28. Settlement and Consent Award**

(a) The Parties may agree, at any stage of the Arbitration process, to submit the case to JAMS for mediation. The JAMS mediator assigned to the case may not be the Arbitrator or a member of the Appeal Panel, unless the Parties so agree pursuant to Rule 28(b).

(b) The Parties may agree to seek the assistance of the Arbitrator in reaching settlement. By their written agreement to submit the matter to the Arbitrator for settlement assistance, the Parties will be deemed to have agreed that the assistance of the Arbitrator in such settlement efforts will not disqualify the Arbitrator from continuing to serve as Arbitrator if settlement is not reached; nor shall such

assistance be argued to a reviewing court as the basis for vacating or modifying an Award.

(c) If, at any stage of the Arbitration process, all Parties agree upon a settlement of the issues in dispute and request the Arbitrator to embody the agreement in a Consent Award, the Arbitrator shall comply with such request unless the Arbitrator believes the terms of the agreement are illegal or undermine the integrity of the Arbitration process. If the Arbitrator is concerned about the possible consequences of the proposed Consent Award, he or she shall inform the Parties of that concern and may request additional specific information from the Parties regarding the proposed Consent Award. The Arbitrator may refuse to enter the proposed Consent Award and may withdraw from the case.

#### **Rule 29. Sanctions**

The Arbitrator may order appropriate sanctions for failure of a Party to comply with its obligations under any of these Rules. These sanctions may include, but are not limited to, assessment of Arbitration fees and Arbitrator compensation and expenses, any other costs occasioned by the actionable conduct including reasonable attorney's fees, exclusion of certain evidence, drawing adverse inferences, or in extreme cases determining an issue or issues submitted to Arbitration adversely to the Party that has failed to comply.

#### **Rule 30. Disqualification of the Arbitrator as a Witness or Party and Exclusion of Liability**

(a) The Parties may not call the Arbitrator, the Case Manager or any other JAMS employee or agent as a witness or as an expert in any pending or subsequent litigation or other proceeding involving the Parties and relating to the dispute that is the subject of the Arbitration. The Arbitrator, Case Manager and other JAMS employees and agents are also incompetent to testify as witnesses or experts in any such proceeding.

(b) The Parties shall defend and/or pay the cost (including any attorneys' fees) of defending the Arbitrator, Case Manager and/or JAMS from any subpoenas from outside Parties arising from the Arbitration.

(c) The Parties agree that neither the Arbitrator, Case Manager nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, Case Manager nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including but not limited to any disqualification of or recusal by the Arbitrator.

#### **Rule 31. Fees**

(a) Except as provided in paragraph (c) below, unless the Parties have agreed to a different allocation, each Party shall pay its *pro-rata* share of JAMS fees and expenses as set forth in the JAMS fee schedule in effect at the time of the commencement of the Arbitration. To the extent possible, the allocation of such fees and expenses shall not be disclosed to the Arbitrator. JAMS agreement to render services is jointly with the Party and the attorney or other representative of the Party in the Arbitration. The non-payment of fees may result in an administrative suspension of the case in accordance with Rule 6(c).

(b) JAMS requires that the Parties deposit the fees and expenses for the Arbitration prior to the Hearing and the Arbitrator may preclude a Party that has failed to deposit its *pro-rata* or agreed-upon share of the fees and expenses from offering evidence of any affirmative claim at the Hearing.

(c) If an arbitration is based on a clause or agreement that is required as a condition of employment, the only fee that an employee may be required to pay is the initial JAMS Case Management Fee. JAMS does not preclude an employee from contributing to administrative and arbitrator fees and expenses. If an arbitration is not based on a clause or agreement that is required as a condition of employment, the Parties are jointly and severally liable for the payment of JAMS Arbitration fees and Arbitrator compensation and expenses. In the event that one Party has paid more than its share of such fees, compensation and expenses, the Arbitrator may award against any other Party any such fees, compensation and expenses that such Party owes with respect to the Arbitration.

(d) Entities whose interests are not adverse with respect to the issues in dispute shall be treated as a single Party for

purposes of JAMS assessment of fees. JAMS shall determine whether the interests between entities are adverse for purpose of fees, considering such factors as whether the entities are represented by the same attorney and whether the entities are presenting joint or separate positions at the Arbitration.

### **Rule 32. Bracketed (or High-Low) Arbitration Option**

(a) At any time before the issuance of the Arbitration Award, the Parties may agree, in writing, on minimum and maximum amounts of damages that may be awarded on each claim or on all claims in the aggregate. The Parties shall promptly notify JAMS, and provide to JAMS a copy of their written agreement setting forth the agreed-upon maximum and minimum amounts.

(b) JAMS shall not inform the Arbitrator of the agreement to proceed with this option or of the agreed-upon minimum and maximum levels without the consent of the Parties.

(c) The Arbitrator shall render the Award in accordance with Rule 24.

(d) In the event that the Award of the Arbitrator is between the agreed-upon minimum and maximum amounts, the Award shall become final as is. In the event that the Award is below the agreed-upon minimum amount, the final Award issued shall be corrected to reflect the agreed-upon minimum amount. In the event that the Award is above the agreed-upon maximum amount, the final Award issued shall be corrected to reflect the agreed-upon maximum amount.

### **Rule 33. Final Offer (or Baseball) Arbitration Option**

(a) Upon agreement of the Parties to use the option set forth in this Rule, at least seven (7) calendar days before the Arbitration Hearing, the Parties shall exchange and provide to JAMS written proposals for the amount of money damages they would offer or demand, as applicable, and that they believe to be appropriate based on the standard set forth in Rule 24(c). JAMS shall promptly provide a copy of the Parties' proposals to the Arbitrator, unless the Parties agree that they should not be provided to the Arbitrator. At any time prior to the close of the Arbitration Hearing,

the Parties may exchange revised written proposals or demands, which shall supersede all prior proposals. The revised written proposals shall be provided to JAMS, which shall promptly provide them to the Arbitrator, unless the Parties agree otherwise.

(b) If the Arbitrator has been informed of the written proposals, in rendering the Award the Arbitrator shall choose between the Parties' last proposals, selecting the proposal that the Arbitrator finds most reasonable and appropriate in light of the standard set forth in Rule 24(c). This provision modifies Rule 24(h) in that no written statement of reasons shall accompany the Award.

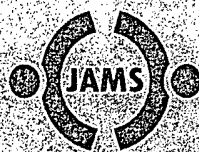
(c) If the Arbitrator has not been informed of the written proposals, the Arbitrator shall render the Award as if pursuant to Rule 24, except that the Award shall thereafter be corrected to conform to the closest of the last proposals, and the closest of the last proposals will become the Award.

(d) Other than as provided herein, the provisions of Rule 24 shall be applicable.

### **Rule 34. Optional Arbitration Appeal Procedure**

At any time before the Award becomes final pursuant to Rule 24, the Parties may agree to the JAMS Optional Arbitration Appeal Procedure. All Parties must agree in writing for such procedure to be effective. Once a Party has agreed to the Optional Arbitration Appeal Procedure, it cannot unilaterally withdraw from it, unless it withdraws, pursuant to Rule 13, from the Arbitration.

THE RESOLUTION EXPERTS



1.800.352.JAMS [www.jamsadr.com](http://www.jamsadr.com)

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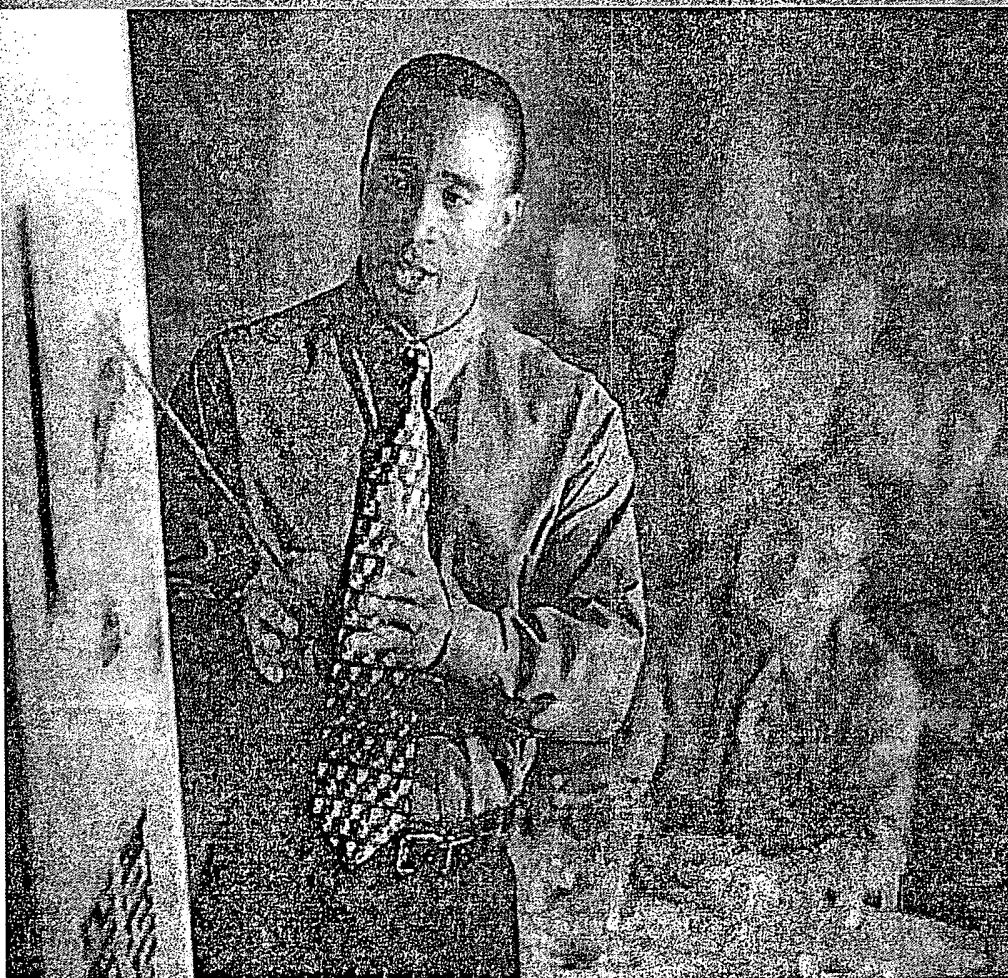


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# Employment Arbitration Rules and Mediation Procedures

*Rules Amended and Effective November 1, 2009  
Fee Schedule Amended and Effective June 1, 2010*



American Arbitration Association  
*Dispute Resolution Services Worldwide*

[www.adr.org](http://www.adr.org)

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## Employment Arbitration Rules and Mediation Procedures

### 1. Applicable Rules of Arbitration

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter “AAA”) or under its *Employment Arbitration Rules and Mediation Procedures* or for arbitration by the AAA of an employment dispute without specifying particular rules\*. If a party establishes that an adverse material inconsistency exists between the arbitration agreement and these rules, the arbitrator shall apply these rules.

If, within 30 days after the AAA’s commencement of administration, a party seeks judicial intervention with respect to a pending arbitration and provides the AAA with documentation that judicial intervention has been sought, the AAA will suspend administration for 60 days to permit the party to obtain a stay of arbitration from the court.

These rules, and any amendment of them, shall apply in the form in effect at the time the demand for arbitration or submission is received by the AAA.

\* *The National Rules for the Resolution of Employment Disputes* have been re-named the *Employment Arbitration Rules and Mediation Procedures*. Any arbitration agreements providing for arbitration under its *National Rules for the Resolution of Employment Disputes* shall be administered pursuant to these *Employment Arbitration Rules and Mediation Procedures*.

### 2. Notification

An employer intending to incorporate these rules or to refer to the dispute resolution services of the AAA in an employment ADR plan, shall, at least 30 days prior to the planned effective date of the program:

- (i) notify the Association of its intention to do so and,

- (ii) provide the Association with a copy of the employment dispute resolution plan.

Compliance with this requirement shall not preclude an arbitrator from entertaining challenges as provided in Section 1. If an employer does not comply with this requirement, the Association reserves the right to decline its administrative services.

### 3. AAA as Administrator of the Arbitration

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

### 4. Initiation of Arbitration

Arbitration shall be initiated in the following manner:

- a. The parties may submit a joint request for arbitration.
- b. In the absence of a joint request for arbitration:
  - (i) The initiating party (hereinafter "Claimant[s]") shall:
    - (1) File a written notice (hereinafter "Demand") of its intention to arbitrate at any office of the AAA within the time limit established by the applicable statute of limitations. Any dispute over the timeliness of the demand shall be referred to the arbitrator. The filing shall be made in duplicate, and each copy shall include the applicable arbitration agreement. The Demand shall set forth the names, addresses, and telephone numbers of the parties; a brief statement of the nature of the dispute; the amount in controversy, if any; the remedy sought; and requested hearing location.



- (2) Simultaneously provide a copy of the Demand to the other party (hereinafter "Respondent[s]").
  - (3) Include with its Demand the applicable filing fee, unless the parties agree to some other method of fee advancement.
- (ii) The Respondent(s) may file an Answer with the AAA within 15 days after the date of the letter from the AAA acknowledging receipt of the Demand. The Answer shall provide the Respondent's brief response to the claim and the issues presented. The Respondent(s) shall make its filing in duplicate with the AAA and simultaneously shall send a copy of the Answer to the Claimant. If no answering statement is filed within the stated time, Respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.
- (iii) The Respondent(s):
- (1) May file a counterclaim with the AAA within 15 days after the date of the letter from the AAA acknowledging receipt of the Demand. The filing shall be made in duplicate. The counterclaim shall set forth the nature of the claim, the amount in controversy, if any, and the remedy sought.
  - (2) Simultaneously shall send a copy of any counterclaim to the Claimant.
  - (3) Shall include with its filing the applicable filing fee provided for by these rules.
- (iv) The Claimant may file an Answer to the counterclaim with the AAA within 15 days after the date of the letter from the AAA acknowledging receipt of the counterclaim. The Answer shall provide Claimant's brief response to the counterclaim and the issues presented. The Claimant shall make its filing in duplicate with the AAA, and simultaneously shall send a copy of the Answer to the Respondent(s). If no answering statement is filed within the stated time, Claimant will be deemed to deny the counterclaim. Failure to file an answering statement shall not operate to delay the arbitration.

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- c. The form of any filing in these rules shall not be subject to technical pleading requirements.

### 5. Changes of Claim

Before the appointment of the arbitrator, if either party desires to offer a new or different claim or counterclaim, such party must do so in writing by filing a written statement with the AAA and simultaneously provide a copy to the other party(s), who shall have 15 days from the date of such transmittal within which to file an answer with the AAA. After the appointment of the arbitrator, a party may offer a new or different claim or counterclaim only at the discretion of the arbitrator.

### 6. Jurisdiction

- a. The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.
- b. The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
- c. A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

## 7. Administrative and Mediation Conferences

Before the appointment of the arbitrator, any party may request, or the AAA, in its discretion, may schedule an administrative conference with a representative of the AAA and the parties and/or their representatives. The purpose of the administrative conference is to organize and expedite the arbitration, explore its administrative aspects, establish the most efficient means of selecting an arbitrator and to consider mediation as a dispute resolution option. There is no administrative fee for this service.

At any time after the filing of the Demand, with the consent of the parties, the AAA will arrange a mediation conference under its Mediation Procedures to facilitate settlement. The mediator shall not be any arbitrator appointed to the case, except by mutual written agreement of the parties. There is no additional filing fee for initiating a mediation under the AAA Mediation Procedures for parties to a pending arbitration.

## 8. Arbitration Management Conference

As promptly as practicable after the selection of the arbitrator(s), but not later than 60 days thereafter, an arbitration management conference shall be held among the parties and/or their attorneys or other representatives and the arbitrator(s). Unless the parties agree otherwise, the Arbitration Management Conference will be conducted by telephone conference call rather than in person. At the Arbitration Management Conference the matters to be considered shall include, without limitation:

- a. the issues to be arbitrated;
- b. the date, time, place and estimated duration of the hearing;
- c. the resolution of outstanding discovery issues and establishment of discovery parameters;
- d. the law, standards, rules of evidence, and burdens of proof that are to apply to the proceeding;

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- e. the exchange of stipulations and declarations regarding facts, exhibits, witnesses, and other issues;
- f. the names of witnesses (including expert witnesses), the scope of witness testimony, and witness exclusion;
- g. the value of bifurcating the arbitration into a liability phase and damages phase;
- h. the need for a stenographic record;
- i. whether the parties will summarize their arguments orally or in writing;
- j. the form of the award;
- k. any other issues relating to the subject or conduct of the arbitration;
- l. the allocation of attorney's fees and costs;
- m. the specification of undisclosed claims;
- n. the extent to which documentary evidence may be submitted at the hearing;
- o. the extent to which testimony may be admitted at the hearing telephonically, over the internet, by written or video-taped deposition, by affidavit, or by any other means;
- p. any disputes over the AAA's determination regarding whether the dispute arose from an individually-negotiated employment agreement or contract, or from an employer-promulgated plan (see Costs of Arbitration Section).

The arbitrator shall issue oral or written orders reflecting his or her decisions on the above matters and may conduct additional conferences when the need arises.

There is no AAA administrative fee for an Arbitration Management Conference.

## 9. Discovery

The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration.

The AAA does not require notice of discovery-related matters and communications unless a dispute arises. At that time, the parties should notify the AAA of the dispute so that it may be presented to the arbitrator for determination.

## 10. Fixing of Locale

(the city, county, state, territory and/or country of the Arbitration)

If the parties disagree as to the locale, the AAA may initially determine the place of arbitration, subject to the power of the arbitrator(s), after their appointment to make a final determination on the locale. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the arbitration.

## 11. Date, Time, and Place (the physical site of the hearing within the designated locale) of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 days in advance of the hearing date, unless otherwise agreed by the parties.

12. Number, Qualifications and Appointment of Neutral Arbitrators

- a. If the arbitration agreement does not specify the number of arbitrators or the parties do not agree otherwise, the dispute shall be heard and determined by one arbitrator.
- b. Qualifications
  - (i) Neutral arbitrators serving under these rules shall be experienced in the field of employment law.
  - (ii) Neutral arbitrators serving under these rules shall have no personal or financial interest in the results of the proceeding in which they are appointed and shall have no relation to the underlying dispute or to the parties or their counsel that may create an appearance of bias.
  - (iii) The roster of available arbitrators will be established on a non-discriminatory basis, diverse by gender, ethnicity, background, and qualifications.
  - (iv) The AAA may, upon request of a party within the time set to return their list or upon its own initiative, supplement the list of proposed arbitrators in disputes arising out of individually-negotiated employment contracts with persons from the Commercial Roster, to allow the AAA to respond to the particular need of the dispute. In multi-arbitrator disputes, at least one of the arbitrators shall be experienced in the field of employment law.
- c. If the parties have not appointed an arbitrator and have not provided any method of appointment, the arbitrator shall be appointed in the following manner:
  - (i) Shortly after it receives the Demand, the AAA shall send simultaneously to each party a letter containing an identical list of names of persons chosen from the Employment Dispute Resolution Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.

- (ii) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable.
- (iii) From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the power to make the appointment from among other members of the panel without the submission of additional lists.

### 13. Party-Appointed Arbitrators

- a. If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed.
- b. Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-16 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-16(a) that the party-appointed arbitrators are to be non-neutral and need not meet those standards. The notice of appointment, with the name, address, and contact information of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.

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- c. If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.
- d. If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 15 days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

- a. If, pursuant to Section R-13, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.
- b. If no period of time is specified for appointment of the chairperson and the party-appointed arbitrators or the parties do not make the appointment within 15 days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.
- c. If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-12, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.



## 15. Disclosure

- a. Any person appointed or to be appointed as an arbitrator shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.
- b. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
- c. In order to encourage disclosure by arbitrators, disclosure of information pursuant to this Section R-15 is not to be construed as an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

## 16. Disqualification of Arbitrator

- a. Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:
  - (i) partiality or lack of independence,
  - (ii) inability or refusal to perform his or her duties with diligence and in good faith, and
  - (iii) any grounds for disqualification provided by applicable law.The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be nonneutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

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- b. Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

### 17. Communication with Arbitrator

- a. No party and no one acting on behalf of any party shall communicate *ex parte* with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate *ex parte* with a candidate for direct appointment pursuant to Section R-13 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.
- b. Section R-17(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-16(a), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-16(a), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-17(a) should nonetheless apply prospectively.

### 18. Vacancies

- a. If for any reason an arbitrator is unable to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with applicable provisions of these Rules.

- b. In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.
- c. In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

#### 19. Representation

Any party may be represented by counsel or other authorized representatives. For parties without representation, the AAA will, upon request, provide reference to institutions which might offer assistance. A party who intends to be represented shall notify the other party and the AAA of the name and address of the representative at least 10 days prior to the date set for the hearing or conference at which that person is first to appear. If a representative files a Demand or an Answer, the obligation to give notice of representative status is deemed satisfied.

#### 20. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

#### 21. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

22. Attendance at Hearings

The arbitrator shall have the authority to exclude witnesses, other than a party, from the hearing during the testimony of any other witness. The arbitrator also shall have the authority to decide whether any person who is not a witness may attend the hearing.

23. Confidentiality

The arbitrator shall maintain the confidentiality of the arbitration and shall have the authority to make appropriate rulings to safeguard that confidentiality, unless the parties agree otherwise or the law provides to the contrary.

24. Postponements

The arbitrator: (1) may postpone any hearing upon the request of a party for good cause shown; (2) must postpone any hearing upon the mutual agreement of the parties; and (3) may postpone any hearing on his or her own initiative.

25. Oaths

Before proceeding with the first hearing, each arbitrator shall take an oath of office. The oath shall be provided to the parties prior to the first hearing. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

26. Majority Decision

All decisions and awards of the arbitrators must be by a majority, unless the unanimous decision of all arbitrators is expressly required by the arbitration agreement or by law.

## 27. Dispositive Motions

The arbitrator may allow the filing of a dispositive motion if the arbitrator determines that the moving party has shown substantial cause that the motion is likely to succeed and dispose of or narrow the issues in the case.

## 28. Order of Proceedings

A hearing may be opened by: (1) recording the date, time, and place of the hearing; (2) recording the presence of the arbitrator, the parties, and their representatives, if any; and (3) receiving into the record the Demand and the Answer, if any. The arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved.

The parties shall bear the same burdens of proof and burdens of producing evidence as would apply if their claims and counterclaims had been brought in court.

Witnesses for each party shall submit to direct and cross examination.

With the exception of the rules regarding the allocation of the burdens of proof and going forward with the evidence, the arbitrator has the authority to set the rules for the conduct of the proceedings and shall exercise that authority to afford a full and equal opportunity to all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute. When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including web conferencing, internet communication, telephonic conferences and means other than an in-person presentation of evidence. Such alternative means must still afford a full and equal opportunity to all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and when involving witnesses, provide that such witness submit to direct and cross-examination.

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The arbitrator, in exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute, may direct the order of proof, bifurcate proceedings, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.

Documentary and other forms of physical evidence, when offered by either party, may be received in evidence by the arbitrator.

The names and addresses of all witnesses and a description of the exhibits in the order received shall be made a part of the record.

### 29. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be based solely on the default of a party. The arbitrator shall require the party who is in attendance to present such evidence as the arbitrator may require for the making of the award.

### 30. Evidence

The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the arbitrator deems necessary to an understanding and determination of the dispute. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any party or arbitrator is absent, in default, or has waived the right to be present, however "presence" should not be construed to mandate that the parties and arbitrators must be physically present in the same location.

An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

The arbitrator shall be the judge of the relevance and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary. The arbitrator may in his or her discretion direct the order of proof, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any party is absent, in default, or has waived the right to be present.

If the parties agree or the arbitrator directs that documents or other evidence may be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator, unless the parties agree to a different method of distribution. All parties shall be afforded an opportunity to examine such documents or other evidence and to lodge appropriate objections, if any.

### 31. Inspection

Upon the request of a party, the arbitrator may make an inspection in connection with the arbitration. The arbitrator shall set the date and time, and the AAA shall notify the parties. In the event that one or all parties are not present during the inspection, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

### 32. Interim Measures

At the request of any party, the arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court, as stated in Rule 39(d), Award.

A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

### 33. Closing of Hearing

The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.

If briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If documents are to be filed as provided in Rule 30 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the arbitrator is required to make the award shall commence to run, in the absence of other agreements by the parties, upon closing of the hearing.

### 34. Reopening of Hearing

The hearing may be reopened by the arbitrator upon the arbitrator's initiative, or upon application of a party for good cause shown, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed on by the parties in the contract(s) out of which the controversy has arisen, the matter may not be reopened unless the parties agree on an extension of time. When no specific date is fixed in the contract, the arbitrator may reopen the hearing and shall have 30 days from the closing of the reopened hearing within which to make an award.

### 35. Waiver of Oral Hearing

The parties may provide, by written agreement, for the waiver of oral hearings.

If the parties are unable to agree as to the procedure, upon the appointment of the arbitrator, the arbitrator shall specify a fair and equitable procedure.



### 36. Waiver of Objection/Lack of Compliance with These Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with, and who fails to state objections thereto in writing or in a transcribed record, shall be deemed to have waived the right to object.

### 37. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any extension.

### 38. Serving of Notice

- a. Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party, or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.
- b. The AAA, the arbitrator, and the parties may also use overnight delivery or electronic facsimile transmission (fax), to give the notices required by these Rules. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (e-mail), or other methods of communication.
- c. Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

39. The Award

- a. The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 days from the date of closing of the hearing or, if oral hearings have been waived, from the date of the AAA's transmittal of the final statements and proofs to the arbitrator. Three additional days are provided if briefs are to be filed or other documents are to be transmitted pursuant to Rule 30.
- b. An award issued under these rules shall be publicly available, on a cost basis. The names of the parties and witnesses will not be publicly available, unless a party expressly agrees to have its name made public in the award.
- c. The award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise. It shall be executed in the manner required by law.
- d. The arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law. The arbitrator shall, in the award, assess arbitration fees, expenses, and compensation as provided in Rules 43, 44, and 45 in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA, subject to the provisions contained in the Costs of Arbitration section.
- e. If the parties settle their dispute during the course of the arbitration and mutually request, the arbitrator may set forth the terms of the settlement in a consent award.
- f. The parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail, addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any manner that may be required by law.
- g. The arbitrator's award shall be final and binding.

#### 40. Modification of Award

Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator to correct any clerical, typographical, technical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 days to respond to the request. The arbitrator shall dispose of the request within 20 days after transmittal by the AAA to the arbitrator of the request and any response thereto. If applicable law requires a different procedural time frame, that procedure shall be followed.

#### 41. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to the party, at that party's expense, certified copies of any papers in the AAA's case file that may be required in judicial proceedings relating to the arbitration.

#### 42. Applications to Court

- a. No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- b. Neither the AAA nor any arbitrator in a proceeding under these rules is or shall be considered a necessary or proper party in judicial proceedings relating to the arbitration.
- c. Parties to these procedures shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction.
- d. Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

#### 43. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe filing and other administrative fees to compensate it for the cost of providing administrative services. The AAA administrative fee schedule in effect at the time the demand for arbitration or submission agreement is received shall be applicable.

AAA fees shall be paid in accordance with the Costs of Arbitration Section (see pages 39-48).

The AAA may, in the event of extreme hardship on any party, defer or reduce the administrative fees. (To ensure that you have the most current information, see our website at [www.adr.org](http://www.adr.org)).

#### 44. Neutral Arbitrator's Compensation

Arbitrators shall charge a rate consistent with the arbitrator's stated rate of compensation. If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.

Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator. Payment of the arbitrator's fees and expenses shall be made by the AAA from the fees and monies collected by the AAA for this purpose.

Arbitrator compensation shall be borne in accordance with the Costs of Arbitration Section.

#### 45. Expenses

Unless otherwise agreed by the parties or as provided under applicable law, the expenses of witnesses for either side shall be borne by the party producing such witnesses.

All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof

and witnesses produced at the direction of the arbitrator shall be borne in accordance with the Costs of Arbitration Section.

#### 46. Deposits

The AAA may require deposits in advance of any hearings such sums of money as it deems necessary to cover the expenses of the arbitration, including the arbitrator's fee, if any, and shall render an accounting and return any unexpended balance at the conclusion of the case.

#### 47. Suspension for Non-Payment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment. If such payments are not made, the arbitrator may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the AAA may suspend or terminate the proceedings.

#### 48. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these Rules, it shall be resolved by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other procedures shall be interpreted and applied by the AAA.

#### Costs of Arbitration (including AAA Administrative Fees)

This Costs of Arbitration section contains two separate and distinct subsections. Initially, the AAA shall make an administrative determination as to whether the dispute arises from an employer-promulgated plan or an individually-negotiated employment agreement or contract.

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If a party disagrees with the AAA's determination, the parties may bring the issue to the attention of the arbitrator for a final determination. The arbitrator's determination will be made on documents only, unless the arbitrator deems a hearing is necessary.

### For Disputes Arising Out of Employer-Promulgated Plans\*:

Arbitrator compensation is not included as part of the administrative fees charged by the AAA. Arbitrator compensation is based on the most recent biography sent to the parties prior to appointment. The employer shall pay the arbitrator's compensation unless the employee, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation. Arbitrator compensation, expenses as defined in section (iv) below, and administrative fees are not subject to reallocation by the arbitrator(s) except upon the arbitrator's determination that a claim or counterclaim was filed for purposes of harassment or is patently frivolous.

\* Pursuant to Section 1284.3 of the California Code of Civil Procedure, consumers with a gross monthly income of less than 300% of the federal poverty guidelines are entitled to a waiver of arbitration fees and costs, exclusive of arbitrator fees. This law applies to all consumer agreements subject to the California Arbitration Act, and to all consumer arbitrations conducted in California. Only those disputes arising out of employer promulgated plans are included in the consumer definition. If you believe that you meet these requirements, you must submit to the AAA a declaration under oath regarding your monthly income and the number of persons in your household. Please contact the AAA's Western Case Management Center at 877.528.0880 if you have any questions regarding the waiver of administrative fees. (Effective January 1, 2003.)

### (i) Filing Fees

In cases before a single arbitrator, a nonrefundable filing fee capped in the amount of \$175 is payable in full by the employee when a claim is filed, unless the plan provides that the employee pay less. A nonrefundable fee in the amount of \$925 is payable in full by the employer, unless the plan provides that the employer pay more.

In cases before three or more arbitrators, a nonrefundable filing fee capped in the amount of \$175 is payable in full by the employee when a claim is filed, unless the plan provides that the employee pay less.

A nonrefundable fee in the amount of \$1,800 is payable in full by the employer, unless the plan provides that the employer pay more. There shall be no filing fee charged for a counterclaim.

(ii) Hearing Fees

For each day of hearing held before a single arbitrator, an administrative fee of \$300 is payable by the employer.

For each day of hearing held before a multi-arbitrator panel, an administrative fee of \$500 is payable by the employer.

There is no AAA hearing fee for the initial Arbitration Management Conference.

(iii) Postponement/Cancellation Fees

A fee of \$150 is payable by a party causing a postponement of any hearing scheduled before a single arbitrator.

A fee of \$250 is payable by a party causing a postponement of any hearing scheduled before a multi-arbitrator panel.

(iv) Hearing Room Rental

The hearing fees described above do not cover the rental of hearing rooms. The AAA maintains hearing rooms in most offices for the convenience of the parties. Check with the administrator for availability and rates. Hearing room rental fees will be borne by the employer.

(v) Abeyance Fee

Parties on cases held in abeyance for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

Employment Arbitration Rules and Mediation Procedures

(vi) Expenses

All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne by the employer.

For Disputes Arising Out of Individually-Negotiated Employment Agreements and Contracts:

The AAA's Commercial Fee Schedule, on the following page, will apply to disputes arising out of individually-negotiated employment agreements and contracts, even if such agreements and contracts reference or incorporate an employer-promulgated plan.

Administrative Fee Schedules (Standard and Flexible Fee)

The AAA has two administrative fee options for parties filing claims or counterclaims, the Standard Fee Schedule and Flexible Fee Schedule. The Standard Fee Schedule has a two payment schedule, and the Flexible Fee Schedule has a three payment schedule which offers lower initial filing fees, but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

In an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes. Please refer to Section C-8 of the Supplementary Procedures for Consumer-Related Disputes when filing a consumer-related claim. Note that the Flexible Fee Schedule is not available on cases administered under these supplementary procedures.



The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

**Fees for incomplete or deficient filings:** Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the AAA. However, where the AAA is unable to obtain the agreement of the parties to have the AAA administer the arbitration, the AAA will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the AAA will return the filing fees to the filing party, less the amount specified in the fee schedule below for deficient filings.

Parties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements contained in these Rules shall also be charged the amount specified below for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

**Fees for additional services:** The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules which may be required by the parties' agreement or stipulation.

Employment Arbitration Rules and Mediation Procedures

(i) Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Final Fee
Above \$0 to \$10,000	\$775	\$200
Above \$10,000 to \$75,000	\$975	\$300
Above \$75,000 to \$150,000	\$1,850	\$750
Above \$150,000 to \$300,000	\$2,800	\$1,250
Above \$300,000 to \$500,000	\$4,350	\$1,750
Above \$500,000 to \$1,000,000	\$6,200	\$2,500
Above \$1,000,000 to \$5,000,000	\$8,200	\$3,250
Above \$5,000,000 to \$10,000,000	\$10,200	\$4,000
Above \$10,000,000	Base fee of \$12,800 plus .01% of the amount above \$10,000,000 Fee Capped at \$65,000	\$6,000
Nonmonetary Claims <sup>1</sup>	\$3,350	\$1,250
Deficient Claim Filing Fee <sup>2</sup>	\$350	
Additional Services <sup>3</sup>		

<sup>1</sup>This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of \$10,200.

<sup>2</sup>The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary Procedures for the Resolution of Consumer-Related Disputes, or in cases filed by an Employee who is submitting their dispute to arbitration pursuant to an employer promulgated plan.

<sup>3</sup>The AAA may assess additional fees where procedures or services outside the Rules sections are required under the parties' agreement or by stipulation.

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are \$2,800 for the Initial Filing Fee, plus a \$1,250 Final Fee. Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs.

Parties on cases filed under either the Flexible Fee Schedule or the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879.

#### (ii) Refund Schedule for Standard Fee Schedule

The AAA offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to \$75,000, a minimum filing fee of \$350 will not be refunded. For all other cases, a minimum fee of \$600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

- > 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.

Employment Arbitration Rules and Mediation Procedures

- > 50% of the filing fee, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.
- > 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.

Note: The date of receipt of the demand for arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

(iii) Flexible Fee Schedule

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the AAA will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable Proceed Fee outlined below must be paid.

If a Proceed Fee is not submitted within ninety (90) days of the filing of the Claimant's Demand for Arbitration, the Association will administratively close the file and notify all parties.

No refunds or refund schedule will apply to the Filing or Proceed Fees once received.

The Flexible Fee Schedule below also may be utilized for the filing of counterclaims. However, as with the Claimant's claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled, but will be refunded at the

conclusion of the case if no hearings have occurred. However, if the Association is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

All fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Above \$0 to \$10,000	\$400	\$475	\$200
Above \$10,000 to \$75,000	\$625	\$500	\$300
Above \$75,000 to \$150,000	\$850	\$1250	\$750
Above \$150,000 to \$300,000	\$1,000	\$2125	\$1,250
Above \$300,000 to \$500,000	\$1,500	\$3,400	\$1,750
Above \$500,000 to \$1,000,000	\$2,500	\$4,500	\$2,500
Above \$1,000,000 to \$5,000,000	\$2,500	\$6,700	\$3,250
Above \$5,000,000 to \$10,000,000	\$3,500	\$8,200	\$4,000
Above \$10,000,000	\$4,500	\$10,300 plus .01% of claim amount over \$10,000,000 up to \$65,000	\$6,000
Nonmonetary <sup>1</sup>	\$2,000	\$2,000	\$1,250
Deficient Claim Filing Fee	\$350		
Additional Services <sup>2</sup>			

<sup>1</sup> This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of \$3,500 and a proceed fee of \$8,200.

<sup>2</sup> The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these Rules and which may be required by the parties' agreement or stipulation.

## Employment Arbitration Rules and Mediation Procedures

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879. All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are \$1,000 for the Initial Filing Fee; \$2,125 for the Proceed Fee; and \$1,250 for the Final Fee.

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone or otherwise modify the arbitration proceedings. Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Note: The date of receipt by the AAA of the demand for arbitration will be used to calculate the ninety (90) day time limit for payment of the Proceed Fee.

There is no Refund Schedule in the Flexible Fee Schedule.

### (iv) Hearing Room Rental

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

(v) Abeyance Fee

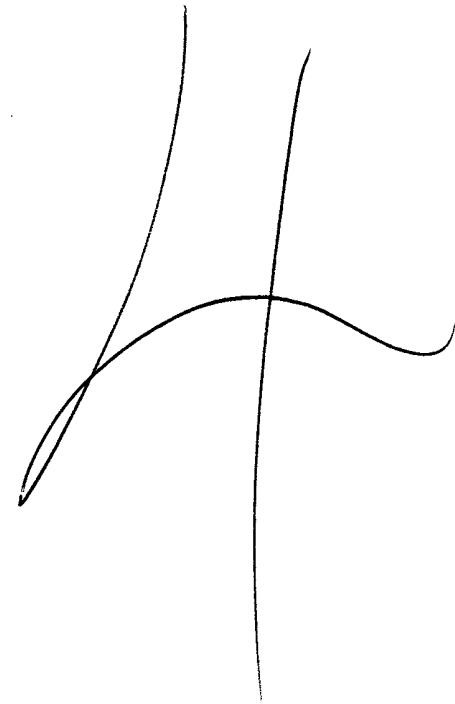
Parties on cases filed under the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

(vi) Expenses

All expenses of the arbitrator, including required travel and other expenses, and any AAA expenses, as well as the costs relating to proof and witnesses produced at the direction of the arbitrator, shall be borne equally by the parties.

For Disputes Proceeding Under the Supplementary Rules for Class Action Arbitration ("Supplementary Rules"):

The AAA's Administered Fee Schedule, as listed in Section 11 of the Supplementary Rules for Class Action Arbitration, shall apply to disputes proceeding under the Supplementary Rules.



A handwritten mark or signature consisting of three main strokes. The first stroke is a vertical line that curves slightly to the right at the top. The second stroke is a vertical line that starts below the first stroke and extends downwards. The third stroke is a horizontal line that starts to the left of the first stroke, crosses it, and then curves to the right, ending with a small hook.



# Reglamento de Arbitraje en materia de Empleo y Procedimientos de Mediación

Reglamento Modificado y en vigor desde el 1 de noviembre de 2009  
Estructura de Tasas Modificada y en Vigor desde el 1 de junio de 2010

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1 Margaret E. Murray (SB #130946)  
 2 LAW OFFICES OF MARGARET E. MURRAY  
 3 517 Los Palmos Drive  
 4 San Francisco, CA 94127  
 Telephone: (415) 585-5400  
 Facsimile: (415) 585-2722  
 Email: [margaret@memlawsf.com](mailto:margaret@memlawsf.com)

**FILED**  
 ALAMEDA COUNTY

MAR - 1 2013  
 By: Grace Barbera Clerk/Clerk

5 Attorneys for Defendants

6  
 7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 8 IN AND FOR THE COUNTY OF ALAMEDA

9 MADALYN GARCIA, individually and on  
 10 behalf of aggrieved employees pursuant to the  
 11 Private Attorney's General Act ("PAGA"),

12 Plaintiff,

13 vs.

14 ELAN HOUSEHOLD, LLC, a Delaware  
 15 limited liability company; LAURA BAXTER-  
 16 SIMONS, an individual; and DOES 1-50,  
 inclusive,

17 Defendants.

Case No. RG 13 662530

**DECLARATION OF PATRICIA  
 SHEPARD IN SUPPORT OF  
 DEFENDANTS' PETITION TO  
 COMPEL ARBITRATION**

**Assigned For All Purposes To:  
 Judge Bereola, Dept. 19**

Date: March 26, 2013  
 Time: 9:00 a.m.  
 Dept: 19  
 Reservation No. R-1370402

Complaint Filed: 01/08/13  
 Trial Date: None

18  
 19  
 20 I, PATRICIA SHEPARD, hereby declare:

21 1. I am a management employee of defendant Elan Household, LLC ("Elan"),  
 22 responsible for operations and personnel. I have personal and first-hand knowledge of the facts  
 23 set forth in this declaration, and could and would competently testify to those facts if called as a  
 24 witness in this action.

25 2. In late 2011, Elan conducted an internal audit of its payroll systems. As a result of  
 26 that audit, Elan determined that it could not be absolutely confident that its accounting systems  
 27 had accounted for all of its employees' work time. Consequently, Elan switched to a new

28  
 DECLARATION OF PATRICIA SHEPARD IN SUPPORT OF DEFENDANTS' PETITION TO COMPEL  
 ARBITRATION -- Case No. RG 13 662530

1 timekeeping system and offered good faith payments to its employees to compensate them for  
2 any possible underpayment.

3 3. In a face-to-face meeting on January 26, 2012, I explained to Plaintiff Madalyn  
4 Garcia ("Plaintiff") that Elan had conducted a review of its payroll records and that the payroll  
5 systems were not as good as we would have liked. I further explained that while we believed she  
6 had been paid for all hours worked, we wanted to be sure and wished to provide her with an  
7 additional one-time payment to cover any possible shortfall. I presented Plaintiff with a written  
8 settlement and release agreement that offered to pay her a lump sum of \$5,474.00 in exchange for  
9 her release of claims that might have accrued until that time. I asked Plaintiff to review the  
10 amount and let me know if she had any questions. Plaintiff said words to the effect that she  
11 believed Elan did not owe her any additional money.

12 4. I told Plaintiff that the document was an important legal agreement that she should  
13 review carefully and take her time to do so. I invited her to contact me after the meeting with any  
14 questions or concerns. I knew that Plaintiff was involved at that time in a legal dispute with her  
15 former employer, so I suggested that she should review the proposed settlement and release  
16 agreement with her lawyer.

17 5. Plaintiff did not contact me with any questions about the release agreement, and  
18 she never questioned the amount being offered her, the terms of the release, or the arbitration  
19 provision in the agreement.

20 6. After the meeting, Plaintiff took a copy of the agreement with her. She returned  
21 the signed release to Elan twelve days later, on February 6, 2012. A true and correct copy of that  
22 agreement is attached as Exhibit 3 to the Declaration of Laura Baxter-Simons submitted with this  
23 petition.

24 7. At no time was Plaintiff (or any other employee) pressured in any way to sign the  
25 release. I did not tell Plaintiff that she was required to sign the release or that she would suffer  
26 any negative consequences if she did not sign it. Plaintiff was free either to refuse the release and  
27 keep her potential claims, or sign the release in exchange for the payment Elan offered her.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I executed this declaration on February 27, 2013 at San Francisco, California.

  
\_\_\_\_\_  
Patricia Shepard

**PROOF OF SERVICE**

I, Margaret E. Murray, am over the age of 18 years and am not a party to the action herein. My business address is 517 Los Paltos Drive, San Francisco, CA 94127.

On March 1, 2013, I caused the following documents:

**DEFENDANTS' NOTICE OF MOTION/PETITION TO COMPEL  
ARBITRATION**

**DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN  
SUPPORT OF PETITION TO COMPEL ARBITRATION**

**DECLARATION OF LAURA BAXTER-SIMONS IN SUPPORT OF  
DEFENDANTS' PETITION TO COMPEL ARBITRATION**

**DECLARATION OF PATRICIA SHEPARD IN SUPPORT OF DEFENDANTS'  
PETITION TO COMPEL ARBITRATION**

**DECLARATION OF MARGARET E. MURRAY IN SUPPORT OF  
DEFENDANTS' PETITION TO COMPEL ARBITRATION**

to be served on:

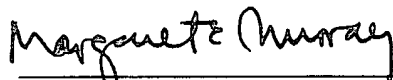
KELLY ARMSTRONG  
JAMIE M. RYKER  
THE ARMSTRONG LAW FIRM  
807 MONTGOMERY STREET  
SAN FRANCISCO, CA 94133

INGRID M. EVANS  
THE EVANS LAW FIRM  
3053 FILLMORE STREET, #236  
SAN FRANCISCO, CA 94123

  X   (BY PERSONAL SERVICE) I caused to be delivered by hand each such envelope to the addressee(s) noted above.

  X   I certify that the above-referenced documents were produced on paper purchased as recycled. [Superior Court Rule 2.101.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 1, 2013 at San Francisco, California.

  
\_\_\_\_\_  
Margaret E. Murray



**FILED**  
ALAMEDA COUNTY

MAR - 1 2013

By *Laura Baxter-Simons* Exec. Off/Clerk

1 Margaret E. Murray (SB #130946)  
2 LAW OFFICES OF MARGARET E. MURRAY  
3 517 Los Palmos Drive  
4 San Francisco, CA 94127  
5 Telephone: (415) 585-5400  
6 Facsimile: (415) 585-2722  
7 Email: [margaret@memlawsf.com](mailto:margaret@memlawsf.com)

8 Attorneys for Defendants

9  
10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
11  
12 IN AND FOR THE COUNTY OF ALAMEDA

13  
14 MADALYN GARCIA, individually and on  
15 behalf of aggrieved employees pursuant to the  
16 Private Attorney's General Act ("PAGA"),

17 Plaintiff,

18 vs.

19 ELAN HOUSEHOLD, LLC, a Delaware  
20 limited liability company; LAURA BAXTER-  
21 SIMONS, an individual; and DOES 1-50,  
22 inclusive,

23 Defendants.

Case No. RG 13 662530

**DECLARATION OF LAURA BAXTER-  
SIMONS IN SUPPORT OF PETITION  
TO COMPEL ARBITRATION**

Date: March 26, 2013

Time: 9:00 a.m.

Dept: 19

Reservation No. R-1370402

Complaint Filed: January 8, 2013

Trial Date: None

24 I, LAURA BAXTER-SIMONS, hereby declare:

25 1. I am one of the defendants in this action. I also am an owner and officer of  
26 defendant Elan Household, LLC ("Elan"). I have personal and first-hand knowledge of the facts  
27 set forth in this declaration, and could and would competently testify to those facts if called as a  
28 witness herein.

29 2. Attached hereto as Exhibit 1 is a true and correct copy of the June 17, 2010  
30 employment agreement between Elan and plaintiff, Madalyn Garcia ("Garcia"). I signed this  
31 agreement on behalf of Elan, and I recognize my signature on it.

32 3. Elan used Town and Country Resources, a placement agency, to perform a search  
33 for a part-time housekeeper who could work on Thursdays, Saturdays, and Sundays. The agency

DECLARATION OF LAURA BAXTER-SIMONS IN SUPPORT OF PETITION TO COMPEL ARBITRATION

-- Case No. RG 13 662530

1 notified me on May 24, 2010 that Garcia was a potential candidate who was willing to work on  
2 that set schedule. We were aware that Garcia had an existing part-time position with another  
3 employer. I interviewed Garcia on May 27, 2010 and provided the agency with proposed terms  
4 of employment and benefit information on May 28, 2010. The agency, at Garcia's direction,  
5 negotiated with me regarding hourly pay, pre-approved vacation days, and possible unpaid time  
6 off. Elan and Garcia reached an agreement on all these matters. The agency arranged to have  
7 Garcia work for two trial days on Saturday, June 12, 2010 and Sunday, June 13, 2010, and I  
8 provided Garcia with a proposed employment agreement after her June 13, 2010 trial day to  
9 review. Garcia returned the signed employment agreement on June 17, 2010.

10 4. Garcia had several days to read and review the June 17, 2010 agreement before  
11 signing it. At no time did Garcia ever mention that she felt compelled or coerced to sign the  
12 agreement or accept the arbitration provision it contains. She made no comments to me about  
13 that arbitration provision at all.

14 5. On October 7, 2010, Garcia told Elan that her other employment had ended and  
15 that she was interested in working additional hours, including full-time, for Elan. Since Elan was  
16 not interested in hiring Garcia full-time at that point, she contacted Town and Country Resources  
17 to find a compatible part-time position. On November 4, 2010, however, I informed Garcia that  
18 Elan had decided to provide her with a full-time position on a set Thursday – Monday schedule  
19 and that we would draw up a new employment agreement confirming these new terms.

20 6. Attached hereto as Exhibit 2 is a true and correct copy of the November 18, 2010  
21 employment agreement between Elan and Garcia for full-time employment at Elan. I signed this  
22 agreement on behalf of Elan, and I recognize my signature on it.

23 7. Garcia did not mention to me that she felt compelled or coerced to sign the new  
24 employment agreement or accept the arbitration provision it contains, and she did not make any  
25 comment to me about the arbitration provision before signing it.

26 8. Attached hereto as Exhibit 3 is a true and correct copy of a January 26, 2012  
27 general release agreement. I signed this agreement on behalf of Elan, and I recognize my  
28 signature on it.


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9. Elan believes that arbitration can provide a simpler and quicker resolution process than an action in court for employer/employee disputes. We want the arbitration to be fair to both sides, so we have incorporated the arbitration rules of major arbitration providers, such as the American Arbitration Association or the Judicial Arbitration and Mediation Services. Elan asks all of its employees for an arbitration agreement as a condition of their employment. Elan always has been willing to negotiate over the arbitration provision with its employees and has always been willing to consider the employee's proposed changes to that provision. The intention of the arbitration provision was to require arbitration for all claims that an employee might bring arising from employment or employment termination, whether those claims were personal or on behalf of others, such as in a class action.

10. The reference in the arbitration provision to attorneys' fees was intended to clarify that the plaintiff's attorneys' fees were not part of the arbitration costs that Elan agreed to pay, not to displace or override any legal right to attorneys' fees or change the right of an arbitrator to award attorneys' fees pursuant to applicable law.

11. The arbitration agreement contains a carve-out for injunctive or equitable relief because Elan's employees come into contact with personal and financial information concerning my husband and me. This is information we wish to keep private.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I executed this declaration on February 26, 2013 at San Francisco, California.

  
\_\_\_\_\_  
Laura Baxter-Simons





1

Elan Household, LLC  
812 Mendocino Avenue  
Berkeley, CA 94707

June 17, 2010

**Personal and Confidential**

Madalyn Garcia  
625 Martin Blvd.  
San Leandro, CA 94577

Dear Madalyn:

We are pleased in this letter agreement (the "Agreement") to confirm the terms of your employment with Elan Household, LLC, a California limited liability company (the "Company") effective June 17, 2010.

1. **Title and Duties:** Your position will be Housekeeper/Cook, performing household services at the home(s) of Nat Simons and Laura Baxter-Simons (together, "Simons") in Berkeley and Sonoma, and at such other places as the Company or Simons may request. Your duties and responsibilities will include, but will not be limited to: cleaning and organizing the Berkeley home, grocery shopping, preparing family meals, providing childcare and providing care for the Simons' pets, as well as other household duties. Your duties, responsibilities and schedule may be revised and modified from time to time by Simons and the Company. You will comply with any policies, procedures and household rules of the Company and Simons, including any Company employee handbook, as they may be amended and revised from time to time.
2. **Commitment to the Company:** You will not engage in any activities, whether or not for pay, that interfere with your duties and responsibilities to the Company.
3. **Pay and Work Schedule:** Your initial base salary will be paid at the rate of \$42,120 per year, subject to normal deductions and withholdings. You normally will be expected to work 27 hours per week. Currently, we expect your hours to be 10:00 am to 7:00 pm, Thursday, Saturday and Sunday. You will be paid in accordance with the Company's payroll practices, which currently provide for payment every two weeks.
4. **Bonuses:** You will be eligible for a bonus twice annually and bonuses will generally be paid through the payroll services in January and July (each representing the prior six month period). Bonuses are performance-based and are at the sole discretion of the Company.
5. **At-Will Employment:** Your employment is on an "at-will" basis. This means that your employment with the Company may be terminated either by you or by the Company at any time with or without cause, and with or without notice. This at-will relationship may not be modified or changed during your employment with the Company, except by written agreement between you and the Company, signed by an officer of the Company.
6. **Background Check:** You agree that the Company may conduct a background check on you and your employment will be contingent on passing this background check. Passing the background check does not alter the at-will status of your employment.

7. Health Benefits: The Company will not provide health insurance coverage for you. Because you are working only part-time, the Company will not establish a Health Reimbursement Account for you, which is otherwise available for all full-time employees of the Company.
8. Vacation: During each full calendar year, you will accrue 6 days (roughly 4 hours per month) of paid vacation (which will be pro-rated if you work for the Company for less than a full calendar year), to be taken at such time or times during the applicable year as you wish, subject to Company policies and the needs of the household. As you will be employed by the Company for only a portion of calendar year 2010, you will be entitled to 3.25 vacation days (assuming you continue to work for the Company until the end of calendar year 2010). If you do not use your accrued vacation days by the end of each calendar year (December 31), you will be compensated for such time at 1.5 times your regular rate of pay in January of the following year (or earlier) through the payroll service. For example, if you have the equivalent of \$500 of accrued vacation at the end of the year, you will be paid \$750 (less taxes) in January of the following year (or earlier). Accrued but unused vacation days will not be carried to the following calendar year except upon written approval by the Company. Upon termination of your employment, you will be paid for accrued but unused vacation time. If the Company allows you to take vacation time before it has accrued, and you subsequently resign or are terminated, the Company will deduct from your final paycheck the amount of pay for any vacation time taken that had not accrued.

Pursuant to our previous discussions, the Company approves your vacation requests for June 26, June 27, October 30 and October 31, 2010. Because you are entitled to only 3.25 paid vacation days for the remainder of calendar year 2010, 0.75 days of your "floating" paid holidays (see section 9 below) will be allocated to make-up the difference.

9. Holidays: You will receive certain paid holidays which will be determined annually by the Company. Paid holidays may change from year to year but will typically include: New Year's Day; Martin Luther King Jr. Day; Presidents' Day; Good Friday; Memorial Day; Independence Day (4th of July); Labor Day; Thanksgiving Day; and Christmas Day. If you work on one of these days, you will be paid your regular wages and given an equivalent number of hours of vacation time to be used on another day. Because you work a part-time schedule, you will be entitled to a pro-rata portion the paid holidays, which will be determined annually by the Company. Additionally, you work on a non-standard schedule (that is, you do not work the standard Monday through Friday) and, as a result, you are not otherwise scheduled to work on all of the paid holidays. Accordingly, in addition to the 2 remaining paid holidays this calendar year that fall on your schedule, the Company will provide you with an additional 1.25 "floating" paid holiday days off for the remainder of the 2010 calendar year. As noted above in section 8, 0.75 of the "floating" paid holiday days will be used for your pre-approved vacation time, leaving 0.5 days for the remainder of the calendar year. The "floating" paid holidays are similar to paid vacation days and are subject to the same policies and procedures (for example, you must obtain the Company's prior approval before taking a paid "floating" holiday).
10. Non-Solicitation of Employees/Consultants: During your employment with the Company and for a period of one (1) year thereafter, you shall not directly or indirectly solicit away employees or consultants of the Company, its affiliates or Simons for your own benefit or for the benefit of any other person or entity.
11. Confidentiality Obligation: During the course of employment, you may see, hear, or otherwise become privy to information about the Company, Simons and their business

and personal affairs, and/or the Simons' extended family and their business and personal affairs and/or any other party for whom the Company and/or the Simons agree to hold such information in confidence. You understand and agree that all such information concerning or relating to the Company and/or Simons, including, but not limited to, personal, family, financial, business, household or career, is "Confidential Information." Confidential Information includes, but is not limited to, business strategies, financial information and forecasts for the Simons family and its relatives, names and addresses of family homes, family members and colleagues, and personal information. Confidential Information also includes all information which has or could have value or utility to the Company or the Simons family or the unauthorized disclosure of which could be detrimental to the interests of the Company or the Simons family, whether or not such information is identified as such by the Company or the Simons family. You agree that both during your employment and after the termination of your employment: (a) you shall not use, publish or otherwise disclose, or authorize the use, publication or disclosure of, or assist any third party in using, publishing or disclosing any Confidential Information; and (b) you shall not communicate with the press, broadcasting, any other media or any other individual or entity regarding any Confidential Information. You acknowledge that your obligations with respect to confidentiality extend to all known and unknown/undeveloped forms of media, including but not limited to, online media (which includes but is not limited to, chat rooms, blogs, "twitter" or similar media, support groups, affinity groups, discussion groups and message boards), and you will not communicate or disclose any details of your employment or any Confidential Information, either under your own name or anonymously, on such media. Upon the termination of your employment, which is an "at-will" employment, you shall immediately deliver to the Company all materials, in any form, in your possession or under your control containing any Confidential Information.

12. Remedies for Breach of Confidentiality: You acknowledge that it would be extremely difficult to measure the amount of damages to the Company, Simons, and/or their businesses arising from a breach or threatened breach of any provision of your confidentiality obligation under this Agreement, and that money damages would be an inadequate remedy. The Company, Simons and/or their businesses shall be entitled to temporary and permanent injunctive relief to restrain you from any such breach or threatened breach. Nothing in this Agreement shall be construed as preventing the Company, Simons and/or their businesses from pursuing any and all remedies available to them for a breach or threatened breach of any provision of this Agreement, including the recovery of monetary damages. In addition, you agree that you will transfer to the Company and/or Simons all money, property or other consideration you receive in conjunction with the unauthorized disclosure of any Confidential Information.
13. Notice: Any notice, demand or request with respect to this Agreement shall be in writing and shall be effective only if it is delivered by personal service or mailed, United States certified mail, postage prepaid, addressed as follows:

Company: Elan Household, LLC  
812 Mendocino Avenue  
Berkeley, CA 94707

Employee: Madalyn Garcia  
625 Martin Blvd.  
San Leandro, CA 94577

Such communications shall be effective when they are received by the addressee; but if sent by certified mail in the manner set forth above, they shall be effective no later than five (5) days after being deposited in the United States mail. Any party may change its address for such communications by giving notice to the other party in conformity with this section.

14. Severability: In the event any provision of this Agreement is, to any extent, invalid or unenforceable, such provision shall be deemed modified to the minimum extent necessary to make it valid and enforceable, and the remainder of this Agreement shall not be affected thereby and shall remain in full force and effect.
15. Governing Law / Venue: This Agreement is to be governed and construed under the laws of the State of California. Venue for any action to enforce or interpret this Agreement shall be proper in the State and Federal Courts located in Alameda County, California, and/or in any jurisdiction in which the Company, Simons and/or their businesses seek to restrict your activities as the Company, Simons and/or their businesses may elect in their sole and absolute discretion.
16. Attorneys' Fees: In the event of any litigation to enforce this Agreement, the prevailing party shall be entitled to recover all costs and expenses incurred, including reasonable attorneys' fees and court costs.
17. Third Party Beneficiary: Simons, their businesses and their extended family are third party beneficiaries of this Agreement.
18. Integration: This Agreement is intended to set forth the entire agreement regarding your employment by the Company and cannot be changed or terminated orally. This Agreement supersedes all prior negotiations or agreements, whether oral or written, regarding the terms and conditions of your employment by the Company (including but in no way limited to compensation, duration, termination and benefits). This is a fully-integrated agreement.
19. Successors And Assigns: This agreement is personal to you and shall not, without the prior written consent of the Company, be assignable by you.
20. Arbitration: Any dispute between you, on the one hand, and the Company, and their officers, directors, employees and/or agents, as well as Simons and their family, on the other hand, in any way arising out of or relating to this Agreement, or connected with your employment or termination of the same (including, but in no way limited to, claims of discrimination or sexual or other forms of harassment), shall be resolved through final and binding arbitration before a single arbitrator, in Alameda County, California, pursuant to the Employment Dispute Resolution Rules of the American Arbitration Association. If the American Arbitration Association for any reason does not administer the arbitration consistent with the terms of this agreement, then the arbitration shall be conducted pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. The Company will pay for all costs unique to the arbitration, including but not limited to the arbitration fees, court reporter fees, and any and all other administrative costs of the arbitration. Each party shall bear its own attorneys' fees. Nothing in this paragraph, however, shall affect yours or the Company's ability to seek from a court injunctive or other equitable relief.


Madalyn, we are very pleased that you will be working with us. Please execute the enclosed copy of this Agreement and return it to me.

Sincerely,

ELAN HOUSEHOLD, LLC

  
\_\_\_\_\_  
Its Co-Chief Executive Officer

Agreed to this 17 day of June, 2010.

  
\_\_\_\_\_  
Madalyn Garcia

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Elan Household, LLC  
812 Mendocino Avenue  
Berkeley, CA 94707

November 18, 2010

**Personal and Confidential**

Madalyn Garcia

~~-625 Martin Blvd.~~

~~San Leandro, CA 94577~~

5050 Hacienda Drive  
Apt 422  
Dublin, CA 94568

Dear Madalyn:

We are delighted that you have agreed to transition from working part-time to working full-time for Elan Household, LLC, a California limited liability company (the "Company"), effective November 15, 2010. Accordingly, we are pleased in this letter agreement (the "Agreement") to confirm the new terms of your employment with Elan, effective November 15, 2010.

1. **Title and Duties:** Your position will be Housekeeper/Cook, performing household services at the home(s) of Nat Simons and Laura Baxter-Simons (together, "Simons") in Berkeley and Sonoma, and at such other places as the Company or Simons may request. Your duties and responsibilities will include, but will not be limited to: cleaning and organizing the Berkeley and Sonoma homes, grocery shopping, preparing family meals, providing childcare and providing care for the Simons' pets, as well as other household duties. You will work primarily at the Berkeley home, but you will also work at the Sonoma home as requested from time to time by Simons and the Company. Your duties, responsibilities and schedule may be revised and modified from time to time by Simons and the Company. You will comply with any policies, procedures and household rules of the Company and Simons, including any Company employee handbook, as they may be amended and revised from time to time.
2. **Commitment to the Company:** You will not engage in any activities, whether or not for pay, that interfere with your duties and responsibilities to the Company.
3. **Pay and Work Schedule:** Your initial base salary will be paid at the rate of \$68,640 per year, subject to normal deductions and withholdings. Currently, we expect your hours to be 10:00 am to 7:00 pm, Thursday, Saturday, Sunday and Monday, and 10:00 am to 6:00 pm, Friday. You will be paid in accordance with the Company's payroll practices, which currently provide for payment every two weeks.
4. **Bonuses:** You will be eligible for a bonus twice annually and bonuses will generally be paid through the payroll services in January and July (each representing the prior six month period). Bonuses are performance-based and are at the sole discretion of the Company.
5. **At-Will Employment:** Your employment is on an "at-will" basis. This means that your employment with the Company may be terminated either by you or by the Company at any time with or without cause, and with or without notice. This at-will relationship may not be modified or changed during your employment with the Company, except by written agreement between you and the Company, signed by an officer of the Company.



6. Health Benefits: The Company will not provide health insurance coverage for you. The Company has offered to establish a Health Reimbursement Account for you, which is available for all full-time employees of the Company, but you have declined that offer at this time.
7. Vacation: During each full calendar year, as a full-time employee, you will accrue 10 days of paid vacation (which will be pro-rated if you work for the Company for less than a full calendar year), to be taken at such time or times during the applicable year as you wish, subject to Company policies and the needs of the household. As you initially worked part-time this year and your schedule has changed, you are entitled to 3.75 vacation days for calendar year 2010 (of which, you have taken 5 vacation days to date – see discussion below). If you do not use your accrued vacation days by the end of each calendar year (December 31), you will be compensated for such time at 1.5 times your regular rate of pay in January of the following year (or earlier) through the payroll service. For example, if you have the equivalent of \$500 of accrued vacation at the end of the year, you will be paid \$750 (less taxes) in January of the following year (or earlier). Accrued but unused vacation days will not be carried to the following calendar year except upon written approval by the Company. Upon termination of your employment, you will be paid for accrued but unused vacation time. If the Company allows you to take vacation time before it has accrued, and you subsequently resign or are terminated, the Company will deduct from your final paycheck the amount of pay for any vacation time taken that had not accrued.

You have previously taken vacation days on June 24, June 26, June 27, October 30 and October 31, 2010. Because you are entitled to only 3.75 paid vacation days for the calendar year 2010, 1.25 days of your “floating” paid holidays (see section 8 below) will be allocated to make-up the difference.

8. Holidays: You will receive certain paid holidays which will be determined annually by the Company. Paid holidays may change from year to year but will typically include: New Year’s Day; Martin Luther King Jr. Day; Presidents’ Day; Good Friday; Memorial Day; Independence Day (4th of July); Labor Day; Thanksgiving Day; and Christmas Day. If you work on one of these days, the Company will pay your regular wages and give you an equivalent number of hours of vacation time that you can use on another day. Although you now work full-time, you previously worked part-time this calendar year and you worked and will continue to work on a non-standard schedule (that is, you do not work the standard Monday through Friday). As a result, you are not otherwise scheduled to work on all of the paid holidays.

For all of calendar year 2010, you are entitled to 3.75 paid holidays (based on time period in which you worked part-time and the time period in which you will work full-time). We understand that you will take Thanksgiving Day (Thursday, Nov. 25) and Christmas Day (Saturday, Dec. 25) as paid holidays in 2010. Therefore, the Company will provide you with an additional 1.75 “floating” paid holiday days off for the 2010 calendar year. As noted above in section 7, we will allocate 1.25 of the “floating” paid holiday days for your pre-approved vacation time, leaving 0.5 days for the remainder of the calendar year. With regard to this remaining 0.5 day “floating” paid holiday, the Company can compensate you for not taking that remaining 0.5 day “floating” paid holiday in the same manner in which the Company compensates employees for not taking all of their vacation days (see section 7) or you can take a half-day off at a mutually agreeable time.

For calendar year 2011, you are entitled to 9 paid holidays. Although you work on a non-standard work schedule, all of the paid holidays in 2011 fall on your work schedule.

Therefore, the Company will not provide you with any "floating" paid holiday days off for the 2011 calendar year.

The "floating" paid holidays are similar to paid vacation days and are subject to the same policies and procedures (for example, you must obtain the Company's prior approval before taking a paid "floating" holiday).

9. Non-Solicitation of Employees/Consultants: During your employment with the Company and for a period of one (1) year thereafter, you shall not directly or indirectly solicit away employees or consultants of the Company, its affiliates or Simons for your own benefit or for the benefit of any other person or entity.
10. Confidentiality Obligation: During the course of employment, you may see, hear, or otherwise become privy to information about the Company, Simons and their business and personal affairs, and/or the Simons' extended family and their business and personal affairs and/or any other party for whom the Company and/or the Simons agree to hold such information in confidence. You understand and agree that all such information concerning or relating to the Company and/or Simons, including, but not limited to, personal, family, financial, business, household or career, is "Confidential Information." Confidential Information includes, but is not limited to, business strategies, financial information and forecasts for the Simons family and its relatives, names and addresses of family homes, family members and colleagues, and personal information. Confidential Information also includes all information which has or could have value or utility to the Company or the Simons family or the unauthorized disclosure of which could be detrimental to the interests of the Company or the Simons family, whether or not such information is identified as such by the Company or the Simons family. You agree that both during your employment and after the termination of your employment: (a) you shall not use, publish or otherwise disclose, or authorize the use, publication or disclosure of, or assist any third party in using, publishing or disclosing any Confidential Information; and (b) you shall not communicate with the press, broadcasting, any other media or any other individual or entity regarding any Confidential Information. You acknowledge that your obligations with respect to confidentiality extend to all known and unknown/undeveloped forms of media, including but not limited to, online media (which includes but is not limited to, chat rooms, blogs, "twitter" or similar media, support groups, affinity groups, discussion groups and message boards), and you will not communicate or disclose any details of your employment or any Confidential Information, either under your own name or anonymously, on such media. Upon the termination of your employment, which is an "at-will" employment, you shall immediately deliver to the Company all materials, in any form, in your possession or under your control containing any Confidential Information.
11. Remedies for Breach of Confidentiality: You acknowledge that it would be extremely difficult to measure the amount of damages to the Company, Simons, and/or their businesses arising from a breach or threatened breach of any provision of your confidentiality obligation under this Agreement, and that money damages would be an inadequate remedy. The Company, Simons and/or their businesses shall be entitled to temporary and permanent injunctive relief to restrain you from any such breach or threatened breach. Nothing in this Agreement shall be construed as preventing the Company, Simons and/or their businesses from pursuing any and all remedies available to them for a breach or threatened breach of any provision of this Agreement, including the recovery of monetary damages. In addition, you agree that you will transfer to the Company and/or Simons all money, property or other consideration you receive in conjunction with the unauthorized disclosure of any Confidential Information.

12. Notice: Any notice, demand or request with respect to this Agreement shall be in writing and shall be effective only if it is delivered by personal service or mailed, United States certified mail, postage prepaid, addressed as follows:

Company: Elan Household, LLC  
812 Mendocino Avenue  
Berkeley, CA 94707

Employee: Madalyn Garcia  
625 Martin Blvd.  
San Leandro, CA 94577

Such communications shall be effective when they are received by the addressee; but if sent by certified mail in the manner set forth above, they shall be effective no later than five (5) days after being deposited in the United States mail. Any party may change its address for such communications by giving notice to the other party in conformity with this section.

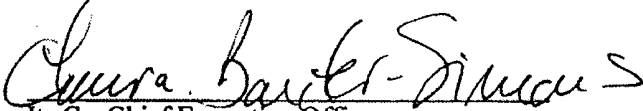
13. Severability: In the event any provision of this Agreement is, to any extent, invalid or unenforceable, such provision shall be deemed modified to the minimum extent necessary to make it valid and enforceable, and the remainder of this Agreement shall not be affected thereby and shall remain in full force and effect.
14. Governing Law / Venue: This Agreement is to be governed and construed under the laws of the State of California. Venue for any action to enforce or interpret this Agreement shall be proper in the State and Federal Courts located in Alameda County, California, and/or in any jurisdiction in which the Company, Simons and/or their businesses seek to restrict your activities as the Company, Simons and/or their businesses may elect in their sole and absolute discretion.
15. Attorneys' Fees: In the event of any litigation to enforce this Agreement, the prevailing party shall be entitled to recover all costs and expenses incurred, including reasonable attorneys' fees and court costs.
16. Third Party Beneficiary: Simons, their businesses and their extended family are third party beneficiaries of this Agreement.
17. Integration: This Agreement is intended to set forth the entire agreement regarding your employment by the Company and cannot be changed or terminated orally. This Agreement supersedes all prior negotiations or agreements, whether oral or written, regarding the terms and conditions of your employment by the Company (including but in no way limited to compensation, duration, termination and benefits). This is a fully-integrated agreement.
18. Successors And Assigns: This agreement is personal to you and shall not, without the prior written consent of the Company, be assignable by you.
19. Arbitration: Any dispute between you, on the one hand, and the Company, and their officers, directors, employees and/or agents, as well as Simons and their family, on the other hand, in any way arising out of or relating to this Agreement, or connected with your employment or termination of the same (including, but in no way limited to, claims of discrimination or sexual or other forms of harassment), shall be resolved through final

and binding arbitration before a single arbitrator, in Alameda County, California, pursuant to the Employment Dispute Resolution Rules of the American Arbitration Association. If the American Arbitration Association for any reason does not administer the arbitration consistent with the terms of this agreement, then the arbitration shall be conducted pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. The Company will pay for all costs unique to the arbitration, including but not limited to the arbitration fees, court reporter fees, and any and all other administrative costs of the arbitration. Each party shall bear its own attorneys' fees. Nothing in this paragraph, however, shall affect yours or the Company's ability to seek from a court injunctive or other equitable relief.


Madalyn, we are very pleased that you will be working with us on a full-time basis. Please execute the enclosed copy of this Agreement and return it to me.

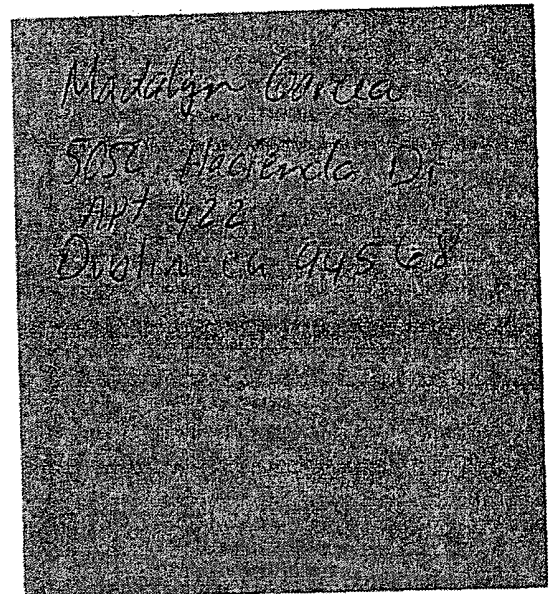
Sincerely,

ELAN HOUSEHOLD, LLC

  
Its Co-Chief Executive Officer

Agreed to this 18<sup>th</sup> day of November, 2010.

  
Madalyn Garcia



Madalyn Garcia  
5050 Hacienda Dr  
APT 622  
Dublin CA 94568



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**ELAN HOUSEHOLD LLC**

January 26, 2012

**PERSONAL & CONFIDENTIAL**

**BY HAND DELIVERY**

Madalyn M Garcia  
5050 Hacienda Drive #422  
Dublin, CA 94568

Re: General Release Agreement

Dear Madalyn:

As we discussed, at the end of 2011, Elan Household conducted an internal audit of its payroll systems. In doing so, we determined that we cannot be absolutely confident that our systems correctly accounted for all of your time. As a result, we have decided to switch to a new timekeeping system, and we want to make a good faith one-time, lump-sum payment to you to resolve any potential payroll and accounting issues. You and Elan agree to enter into this General Release Agreement ("Agreement") on the following terms:

1. Additional Pay. Elan Household will provide you with a gross payment of five-thousand four-hundred and seventy-four dollars (\$5,474.00), less applicable payroll deductions and withholdings. You agree that you have been paid all of the wages and benefits to which you are entitled since you began your employment with Elan Household, including but not limited to all wages, bonuses, vacation, medical insurance benefits, and pay for accrued but unused vacation.

2. Full Release Of Any Claims. In exchange for the payment described in paragraph 1 above, you release Mr. Simons and Ms. Baxter-Simons (and all of their family members, businesses, and all of their present and former employees or agents) and Elan Household (and its parents, subsidiaries or affiliates, or its or their present and former employees or agents) (individually and together referred to as "Releasees"), from any and all claims, known or unknown, that you may now have or have ever had against Releasees, or any of them. The claims that you are releasing (or giving up) include any claims for any kind of pay, benefits, vacation, medical insurance, reimbursements, or other matters having to do with any kind of compensation since your date of hire until now.

You agree and acknowledge that you are releasing claims that you know about and claims that you may not know about at this time. Because this release specifically covers unknown claims, you waive your rights under Section 1542 of the California Civil Code, or under any comparable law of any other jurisdiction. Section 1542 states:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR."

You also waive and release to the maximum extent allowed by law all monetary and other relief that may be sought on your behalf by other persons or agencies. You also agree not to pursue any proceeding in any arbitral, administrative, judicial or other forum regarding any of the claims which are settled and released by this Agreement. This release and waiver of claims specifically excludes any rights which, by law, may not be waived by private agreement; any claims for workers compensation, unemployment benefits, state disability benefits or indemnity; any claims which arise from acts or events occurring after the date on which you sign this Agreement; and any claims for breach of this Agreement.

3. No Filing Or Assignment Of Released Claims. You represent that you have not filed any claims against Elan or any of the Releasees and that no one else has filed claims against the Releasees regarding your relationship with Elan or any of the Releasees on your behalf. You also represent that you have not assigned or transferred any claims you are releasing in this Agreement.

4. Confidentiality. You also agree that this Agreement is confidential and that you will not discuss it, or any of its terms, with anyone without Elan's prior written consent, except to your spouse and any legal or financial advisors or as otherwise required by law.

5. Entire Agreement. This Agreement sets forth the entire agreement and understanding between us regarding its subject matter and cannot be modified in any way except in a writing signed by both parties.

6. Arbitration. Any dispute or controversy between you, on the one hand, and Elan, Mr. Simons, Ms. Baxter-Simons and/or their family (or any other Releasee), on the other hand, in any way arising out of, related to, or connected with this Agreement or the subject matter of the Agreement, or otherwise in any way arising out of, related to, or connected with your employment with Elan, shall be resolved through final and binding arbitration in San Francisco, California before JAMS pursuant to its Employment Rules then in effect.

7. Severability And Choice Of Law. If any provision of this Agreement is held by an arbitrator or a court of competent jurisdiction to be invalid, unenforceable, or void, such provision shall be enforced to the greatest extent permitted by law, and the remainder of this Agreement shall remain in full force and effect. This Agreement will be governed by the laws of the State of California.

8. Acknowledgment. You acknowledge that you have been given every opportunity to read and have read this Agreement, are fully aware of its contents and legal effect, have chosen to enter into this Agreement freely, without coercion, and based on your own judgment and have not relied on any representation or statement made by Elan or any of its representatives about this Agreement or otherwise, except as specifically included in this Agreement.

The parties have read and understand this Agreement and voluntarily sign it. The parties below declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

AGREED: Madalyn Garcia  
Madalyn M Garcia

Date: 2/26/2012

AGREED: Laura Baxter-Simons  
Laura Baxter-Simons, Elan Household LLC

Date: 1/26/12





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Margaret E. Murray (SB #130946)  
LAW OFFICES OF MARGARET E. MURRAY  
517 Los Palmos Drive  
San Francisco, CA 94127  
Telephone: (415) 585-5400  
Facsimile: (415) 585-2722  
Email: [margaret@memlawssf.com](mailto:margaret@memlawssf.com)

**FILED**  
ALAMEDA COUNTY

MAR - 1 2013

By *Guine B. Boreola* Registering Clerk

Attorneys for Defendants

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

MADALYN GARCIA, individually and on  
behalf of aggrieved employees pursuant to the  
Private Attorney's General Act ("PAGA"),

Plaintiff,

vs.

ELAN HOUSEHOLD, LLC, a Delaware  
limited liability company; LAURA BAXTER-  
SIMONS, an individual; and DOES 1-50,  
inclusive,

Defendants.

Case No. RG 13 662530

**DEFENDANTS' NOTICE OF MOTION  
AND MOTION/PETITION TO  
COMPEL ARBITRATION;**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT**

**Assigned For All Purposes To:  
Judge Bereola, Dept. 19**

Date: March 26, 2013  
Time: 9:00 a.m.  
Dept: 19

Reservation No. R-1370402

Complaint Filed: January 8, 2013  
Trial Date: None

**TO ALL PARTIES HEREIN AND TO THEIR COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that on March 26, 2013, at 9:00 a.m., or as soon thereafter as  
may be heard, in Department 19 of the Court captioned above, Defendants Elan Household, LLC  
("Elan") and Laura Baxter-Simons ("Baxter-Simons") will, and hereby do, move the Court for an  
order compelling plaintiff, Madalyn Garcia ("Garcia"), to arbitrate all of her individual claims in  
this action.

DEFENDANTS' NOTICE OF MOTION AND MOTION/PETITION TO COMPEL ARBITRATION  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT -- Case No. RG 13 662530

1 Elan and Baxter-Simons bring this motion pursuant to Sections 1281.2 and 1281.4 of the  
2 California Code of Civil Procedure. The motion to compel arbitration should be granted because  
3 Garcia signed three separate, enforceable arbitration agreements during her 26 months of  
4 employment with Elan. All of those agreements cover Garcia's claims, and none of them are  
5 unconscionable.

6 Pursuant to Rule 3.1330 of the California Rules of Court, Elan and Baxter-Simons  
7 identify the following arbitration provisions signed by Elan and Garcia, and incorporate those  
8 provisions into this notice by reference:

9 1. Paragraph 20 of the June 17, 2010 letter employment agreement between Elan and  
10 Garcia. A true and correct copy of this declaration is attached as Exhibit 1 to the accompanying  
11 declaration of Laura Baxter-Simons, and incorporated herein by reference.

12 2. Paragraph 19 of the November 18, 2010 letter employment agreement between  
13 Elan and Garcia. A true and correct copy of this declaration is attached as Exhibit 2 to the  
14 accompanying declaration of Laura Baxter-Simons, and incorporated herein by reference.

15 3. Paragraph 6 of the January 26, 2012 general release agreement between Elan and  
16 Garcia. A true and correct copy of this declaration is attached as Exhibit 3 to the accompanying  
17 declaration of Laura Baxter-Simons, and incorporated herein by reference.

18 Elan and Baxter-Simons base this motion on this notice, the attached memorandum of  
19 points and authorities, the accompanying declarations of Laura Baxter-Simons, Patricia Shepard,  
20 and Margaret E. Murray, and any other and further argument and evidence that may be presented  
21 in reply papers and at the hearing on this motion.

22 Dated: February 28, 2013

LAW OFFICES OF MARGARET E. MURRAY



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Elan Household, LLC and  
Laura Baxter-Simons

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6  
7

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 IN AND FOR THE COUNTY OF ALAMEDA

10

11 MADALYN GARCIA, individually and on  
behalf of aggrieved employees pursuant to  
12 the Private Attorney's General Act  
("PAGA"),

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Plaintiff,

14

v.

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16 ELAN HOUSEHOLD, LLC, a Delaware  
limited liability company; LAURA  
BAXTER-SIMONS, an individual; and  
17 DOES 1-50, inclusive,

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Defendants.

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Case No. RG 13 662530

**DEFENDANTS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF PETITION TO COMPEL  
ARBITRATION**

**Assigned For All Purposes To:  
Judge Bereola, Dept. 19**

Date: March 26, 2013

Time: 9:00 a.m.

Dept: 19

Reservation No. R-1370402

Complaint Filed: January 8, 2013

Trial Date: None

1 Defendants Elan Household, LLC (“Elan”) and Laura Baxter-Simons (“Baxter-Simons”)  
2 submit this memorandum of points and authorities in support of their petition to compel  
3 arbitration of the claims raised in this action.

#### 4 INTRODUCTION

5 Plaintiff Madalyn Garcia (“Plaintiff”) signed three agreements with defendant Elan, each  
6 containing a provision that requires both Elan and Plaintiff to submit any claims arising from  
7 Plaintiff’s employment to final and binding arbitration before well-known arbitration service  
8 providers. Each agreement is short, unambiguous, and written in plain language. Each was  
9 negotiated by the parties. Each provides all the substantive and procedural safeguards required by  
10 California law. Nevertheless, Plaintiff filed this action and has declined Elan’s request to submit  
11 her claims to arbitration, thereby necessitating this petition.

12 This motion should be granted for the following reasons:

13 1. Plaintiff agreed in writing to litigate all the causes of action contained in her  
14 complaint. All three arbitration provisions cover all claims arising from Plaintiff’s employment  
15 with Elan. Plaintiff’s claims all arise from that employment.

16 2. None of the arbitration provisions Plaintiff accepted is substantively  
17 unconscionable. Each provision satisfies all of the requirements set forth in *Armendariz v.*  
18 *Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83.

19 3. None of the arbitration provisions is procedurally unconscionable. The  
20 agreements which contain the arbitration provisions are either two or just over four pages long,  
21 written in plain language in normal font. Plaintiff had ample time to review each of them before  
22 signing. In addition, the circumstances leading to these agreements were far from oppressive.  
23 The first agreement arose when Plaintiff started work for Elan and was carefully negotiated by  
24 Plaintiff through a placement agency. The second agreement resulted from Plaintiff’s request to  
25 change the terms of her employment. The third came about in connection with Elan’s payment to  
26 Plaintiff of over five thousand dollars to resolve potential claims for back wages that Elan  
27 identified as a result of its own payroll self-audit.

28 Accordingly, Defendant’s petition to compel arbitration should be granted.

1 **STATEMENT OF FACTS**

2 **A. Plaintiff Signed Three Agreements That Contain Arbitration Provisions.**

3 **1. The June 17, 2010 Agreement.**

4 On June 17, 2010, Plaintiff signed an employment agreement with Elan to be a part-time  
5 cook and housekeeper. Declaration of Laura Baxter-Simons (“Baxter-Simons Decl.”) ¶ 2 & Exh.  
6 1 (the “June 2010 Agreement”).

7 The June 2010 Agreement is just over four pages in length, in easy-to-read font. *Id.* ¶ 2  
8 & Exh. 1. Paragraph 20 of that agreement contains an arbitration provision, marked with the  
9 underscored heading “Arbitration.” That provision reads in its entirety as follows:

10 Any dispute between you, on the one hand, and the Company, and  
11 their officers, directors, employees and/or agents, as well as Simons  
12 and their family, on the other hand, in any way arising out of or  
13 relating to this Agreement, or connected with your employment or  
14 termination of the same (including, but in no way limited to, claims  
15 of discrimination or sexual or other forms of harassment) shall be  
16 resolved through final and binding arbitration before a single  
17 arbitrator, in Alameda County, California, pursuant to the  
18 Employment Dispute Resolution Rules of the American Arbitration  
19 Association. If the American Arbitration Association for any  
20 reason does not administer the arbitration consistent with the terms  
21 of this agreement, then the arbitration shall be conducted pursuant  
22 to the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq. The Company  
23 will pay for all costs unique to the arbitration, including but not  
24 limited to the arbitration fees, court reporter fees, and any and all  
25 other administrative costs of the arbitration. Each party shall bear  
26 its own attorney's fees. Nothing in this paragraph, however, shall  
27 affect yours or the Company's ability to seek from a court  
28 injunctive or other equitable relief.

20 *Id.* ¶ 2 & Exh. 1, ¶ 20 (emphasis added). This paragraph is the last substantive provision before  
21 the parties' signatures. The June 2010 Agreement also contains a severability clause which  
22 permits modification of its terms, if necessary, to make them enforceable:

23 [i]n the event any provision of this Agreement is, to any extent  
24 invalid or unenforceable, such provision shall be deemed modified  
25 to the minimum extent, necessary to make it valid or enforceable,  
26 and the remainder of the Agreement shall not be affected thereby  
27 and shall remain in full force and effect.

26 *Id.* ¶ 2 & Exh 1, ¶ 14.

27 Plaintiff could have felt no unreasonable pressure to sign the June 2010 Agreement. She  
28 was already employed part-time elsewhere when she signed it. *Id.* ¶ 3. She had the opportunity

1 to review, discuss, and negotiate the June 2010 Agreement before she signed it, and the  
2 placement agency that represented her did ask for certain concessions from Elan regarding her  
3 pay, vacations, and time off. *Id.* Plaintiff had several days to read and review the June 2010  
4 Agreement before signing it. At no time did Plaintiff say that she felt compelled to accept the  
5 arbitration provision, and she did not raise that issue during the negotiations. *Id.* ¶ 4.

## 6                   **2.     The November 2010 Agreement.**

7           On October 7, 2010, Plaintiff told Elan that her other employment had ended and that she  
8 wanted to work full time at Elan. *Id.* ¶ 5. On November 7, 2010, Elan told Plaintiff that it agreed  
9 to increase Plaintiff's work hours. On November 18, 2010, the parties entered into a new written  
10 employment agreement. *Id.*, ¶ 6 & Exh. 2 (the "November 2010 Agreement"). Like the June  
11 2010 Agreement, the November 2010 agreement is less than five pages long in easy-to-read type.  
12 The two agreements contain identical arbitration and severability provisions. As in the earlier  
13 agreement, the arbitration provision in the November 2010 Agreement begins with the underlined  
14 heading "Arbitration" and is the last substantive provision before the parties' signatures, making  
15 it difficult to miss. *Id.* ¶ 6 & Exh.2, ¶ 19. As before, Plaintiff did not mention the arbitration  
16 provision before she signed the agreement. *Id.* ¶ 7.

## 17                   **3.     The January 2012 Release Agreement.**

18           In late 2011, Elan conducted an internal audit of its payroll systems and determined that it  
19 could not be absolutely confident that its accounting systems had accounted for all of its  
20 employees' work time. Declaration of Patricia Shepard ("Shepard Decl.") ¶ 2. Elan made a good  
21 faith estimate of the amount of any possible underpayments and offered those sums to employees  
22 in exchange for a signed release of claims. In the process, Elan invited each employee to check  
23 his or her own records, communicate any discrepancies or questions, take the time needed to  
24 carefully review the release of complains and consult legal counsel. *Id.*

25           On January 26, 2012, Elan presented Plaintiff with an offer to pay her \$5,474.00 in  
26 exchange for her release of claims. *Id.* ¶ 3. Elan explained to Plaintiff the reason for the offer  
27 and instructed her to review the release carefully. *Id.* Since Elan knew that Plaintiff was  
28 involved in litigation with her previous employer, Elan stressed that Plaintiff should review the

1 agreement with her lawyer. *Id.* In addition, Elan invited Plaintiff to ask any questions that she  
2 had about the offer and release, but she had none. In fact, she told Elan that she did not believe  
3 she was owed any additional pay. *Id.*

4 Plaintiff was not pressured to accept the offer. *Id.* ¶ 4. Plaintiff took a copy of the  
5 proposed release agreement home and returned the signed release twelve days later. *Id.*

6 The resulting January 26, 2012 letter agreement (the “Release”) is just over two pages  
7 long. Baxter-Simons Decl., ¶ 8 & Exh. 3. Paragraph 6 of the Release contains the third  
8 arbitration provision that Plaintiff accepted during her employment with Elan, which states as  
9 follows:

10 Any dispute or controversy between you, on the one hand, and Elan, Mr.  
11 Simons, Ms. Baxter-Simons and/or their family (or any other Releasee), on the  
12 other hand, in any way arising out of, related to, or connected with this  
13 Agreement or the subject matter of the Agreement, or otherwise in any way  
14 arising out of, related to, or connected with your employment with Elan, shall  
15 be resolved through final and binding arbitration in San Francisco, California  
16 before JAMS pursuant to its Employment Rules then in effect.

17 *Id.* Exh. 3, ¶ 6 (emphasis added).

18 Elan believes that arbitration can provide a simple, quick resolution process for disputes,  
19 and favors arbitration, provided that it is fair to everyone concerned. *Id.*, ¶ 9. While Elan  
20 includes arbitration provisions as part of its employment agreements, it will negotiate aspects of  
21 that provision with employees and would have done so with Plaintiff if she had asked.

22 **B. Plaintiff's Complaint and Defendants' Request To Arbitrate.**

23 Plaintiff left Elan's employment in August 2012. Complaint ¶ 18 & n.2. On January 8,  
24 2013, she filed this action. Her complaint alleges ten causes of action against Elan and/or Baxter-  
25 Simons, all arising from her employment at Elan: (1) pregnancy discrimination – FEHA; (2)  
26 violation of the pregnancy disability leave law; (3) wrongful termination in violation of public  
27 policy; (4) failure to pay overtime wages; (5) failure to provide meal breaks; (6) failure to provide  
28 rest breaks; (7) failure to pay timely wages upon discharge; (8) inadequate wage statements; (9)  
unfair business practices; and (10) intentional infliction of emotional distress. Plaintiff also  
asserts a representative cause of action, pursuant to the Private Attorney General's Act (“PAGA”).

1 Defendants asked Plaintiff to arbitrate her claims pursuant to the arbitration agreements,  
2 but she refused. Declaration of Margaret E. Murray ("Murray Decl."), ¶ 2 & Exh. 1.

### 3 ARGUMENT

#### 4 A. This Action is Subject to Mandatory Binding Arbitration.

5 California Code of Civil Procedure Section 1281.2 provides that courts shall order parties  
6 to arbitrate "if it determines that an agreement to arbitrate the controversy exists" and the plaintiff  
7 refuses to honor that agreement, unless one or more defenses apply. Cal. Code Civ. Proc. §  
8 1281.2. Defendants' *prima facie* case for this petition, then, is to prove (1) an arbitration  
9 agreement that covers Plaintiff's claims; and (2) Plaintiff's refusal to arbitrate.

10 Defendants have met these two requirements. First, the three arbitration provisions in the  
11 parties' agreements apply to all of Plaintiff's causes of action. Those provisions cover all claims  
12 "arising or relating to" Plaintiff's employment agreement with Elan or connected with her  
13 "employment or termination," including but not limited to claims of discrimination. Baxter-  
14 Simons Decl., Exh. 1, ¶ 20; Exh. 2, ¶ 19; and Exh. 3, ¶ 6. Plaintiff's claims are based on alleged  
15 pregnancy discrimination, wrongful termination, or violations of the Labor Code. Therefore, all  
16 of Plaintiff's claims arise from her employment at Elan and fall squarely within the scope of all  
17 three arbitration provisions. Plaintiff has refused Defendants' request for arbitration. Murray  
18 Decl., ¶ 2.

19 California public policy strongly favors arbitration as a speedy and relatively inexpensive  
20 method of dispute resolution. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9. "[A]rbitration  
21 agreements allow parties to avoid the costs of litigation, a benefit that may be of particular  
22 importance in employment litigation, which often involves smaller sums of money than disputes  
23 concerning commercial contracts." *Circuit City Stores, Inc. v. Adams* (2001) 532 U.S. 105, 123,  
24 121 S.Ct. 1302, 149 L.Ed.2d 234. Arbitration agreements should be liberally construed, and  
25 doubts as to their applicability to a particular dispute are to be resolved in favor of arbitration.  
26 *Gravillis v. Coldwell Banker Residential Brokerage Co.* (2006) 143 Cal.App.4th 761, 771.

27 The parties' three agreements to arbitrate unquestionably apply to the claims Plaintiff  
28 raises in her complaint. Therefore, this court should enforce those agreements and order the



1 parties to arbitration.<sup>1</sup>

2 **B. Plaintiff Cannot Meet Her Burden of Proving that The Arbitration Clauses**  
3 **Are Unenforceable.**

4 If Plaintiff attempts to avoid enforcement of her three arbitration agreements on grounds  
5 of unconscionability, she must show that all three agreements are both “substantively” and  
6 “procedurally” unconscionable. *See, e.g., Armendariz v. Foundation Health Psychcare Services,*  
7 *Inc.* (2000) 24 Cal.4th 83, 114. Plaintiff bears the burden of proving unconscionability. *Mission*  
8 *Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146,  
9 1158. The relationship between “substantive” and “procedural” unconscionability is typically  
10 described as a “sliding scale,” with more of one requiring less of the other. *Armendariz, supra,*  
11 15 Cal.4th at 114. If Plaintiff fails to show both “substantive” and procedural” unconscionability,  
12 this petition to compel arbitration must be granted. *Brown v. Wells Fargo Bank, NA* (2008) 168  
13 Cal.App.4th 938, 957 (lack of proof of substantive unconscionability requires granting of petition  
14 to compel arbitration); *Crippen v. Central Valley RV Outlet, Inc.* (2004) 124 Cal.App.4th 1159,  
15 1165 (same for lack of proof of procedural unconscionability).

16 **1. The Arbitration Agreements Are Not Substantively Unconscionable.**

17 The arbitration agreements are fair to Plaintiff and cannot be considered substantively  
18 unconscionable in any respect. Our Supreme Court has identified five factors to apply to  
19 determine whether an arbitration provision is substantively unconscionable in cases involving  
20 statutory claims that may not be waived. Those factors involve whether the agreements provide  
21 for: (1) a neutral arbitrator or arbitrators; (2) more than minimal discovery; (3) a written award;  
22 (4) availability of all types of relief; and (5) no need for the employee to pay unreasonable costs.  
23 *Armendariz, supra*, at 102-03.

24 The arbitration provision in the Release calls for arbitration under the employment  
25 arbitration rules of JAMS. *See Baxter-Simons Decl., Exh. 3 ¶ 6.* These rules comply fully with

26 <sup>1</sup> Defendants believe that the arbitration provisions covers Plaintiff’s PAGA claim, as they  
27 have always intended that the arbitration provisions apply to any and all employment disputes,  
28 whether individual claims or class actions. *Baxter-Simons Decl., ¶ 9.*

1 *Armendariz*. First, they provide for a neutral arbitrator. Murray Decl., ¶ 3 & Exh. 2, JAMS Rule  
2 7(a). Each party has the right to one deposition, documents from the other side, and expert  
3 reports from the other side as a matter of right. *Id.* Rules 17(a), 17(b). The arbitrator also has the  
4 explicit power to grant additional depositions. *Id.* Rule 17(b). The arbitrator will issue a written  
5 award. *Id.* Rule 24(h). The arbitrator can award any and all forms of relief. *Id.* Rule 24(c).  
6 Under the JAMS rules, Elan must pay the costs of the arbitration, and Plaintiff would be required  
7 to pay only an initial Case Management Fee, since arbitration was a condition of Plaintiff's  
8 employment pursuant to her employment agreement. *Id.* Rule 31(c); *see also* Baxter-Simons  
9 Decl., ¶ 9 (some form of arbitration provision required as condition of Plaintiff's employment).  
10 At least one court has held that the JAMS Rules for employment arbitration are free of  
11 substantive unconscionability. *Ruhe v. Masimo Corp.* (C.D. Cal. 2011) 2011 U.S. Dist. LEXIS  
12 104811, at 10-12.

13 The arbitration provisions of the June 2010 and November 2010 Agreements call for  
14 arbitration under the employment arbitration rules of AAA. The Court of Appeal has found that  
15 these rules are fair. *Lagatree v. Luce, Forward Hamilton & Scripps LLP* (1999) 74 Cal.App.4th  
16 1105, 1126-27 & n.18. Like JAMS's rules, the AAA employment arbitration rules comply fully  
17 with *Armendariz*. They provide for a neutral arbitrator, experienced in employment law. Murray  
18 Decl., ¶ 4 & Exh. 3, AAA Rule 12(b)(i). They allow the arbitrator to order discovery, including  
19 depositions, interrogatories, and requests for production, as necessary for a "full and fair  
20 exploration of the issues in dispute" (*id.*, at Rule 9); a written award (*id.*, at Rule 39(c)); and the  
21 same relief as would be available in court, including attorneys' fees in accordance with applicable  
22 law (*id.*, at Rule 39(d)). In both the June 2010 and November 2010 Agreements, Elan explicitly  
23 agreed to "pay for all costs unique to the arbitration, including but not limited to the arbitration  
24 fees, court reporter fees, and any and all other administrative costs of the arbitration." Baxter-  
25 Simons Decl., Exh. 1, ¶ 20; *id.* Exh. 2, ¶ 19. Similarly, the AAA rules require the employer to  
26 pay for all hearing fees and all expenses of the arbitrator where, as here, the arbitration is required  
27 pursuant to an "employer-promulgated plan." *Id.*, AAA Rules at 40. An employee's arbitration  
28 expenses are capped at \$175.00, or less than the cost of filing a court action. *Id.*

1 To defeat this petition, Plaintiff must prove at least *some* substantive unconscionability.  
2 *Brown, supra*, 168 Cal.App.4th at 957. Since she cannot do so, Defendants' petition to compel  
3 arbitration should be granted, and Plaintiff should be required to arbitrate her claims as she has  
4 three times agreed to do.

5 **2. The Arbitration Agreements Are Not Procedurally Unconscionable.**

6 To determine whether an arbitration agreement is procedurally unconscionable, the court  
7 must first determine if it is a contract of adhesion. If it is not, then the court must find that the  
8 agreement is not unconscionable. Only if the court finds that an agreement is a contract of  
9 adhesion should it then analyze "procedural unconscionability," which focuses on whether any  
10 "oppression" or "surprise" resulted from the interaction between the parties before the execution  
11 of the contract. *Armendariz, supra*, 24 Cal.4th at 113-14 (citing *Graham v. Scissor-Tail, Inc.*  
12 (1981) 28 Cal.3d 807, 825 and *A&M Produce Co. v. FMC Corp.* (1982) 135 Cal.App.3d 473,  
13 486-87). Here, the parties' arbitration agreements are not contracts of adhesion and are not the  
14 result of any procedural unconscionability during their negotiation.

15 **a. The Parties' Agreements Are Not Contracts of Adhesion.**

16 None of the parties' agreements can be considered "adhesive." As the California Supreme  
17 Court has explained, a contract of adhesion is a "standardized contract, which, imposed and  
18 drafted by the party of superior bargaining strength, relegates to the subscribing party only the  
19 opportunity to adhere to the contract or reject it." *Armendariz, supra*, 24 Cal.4th at 113 (citing  
20 *Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 694). In most cases, even the weaker  
21 party lacks not only the opportunity to negotiate, "but also any realistic opportunity to look  
22 elsewhere for a more favorable contract." *Madden v. Kaiser Foundation Hospitals* (1976) 17  
23 Cal.3d 699, 711. The concern as to adhesion contracts is principally over provisions that "limit  
24 the obligations or liability of the stronger party." The trade-off of a right to a jury for a faster and  
25 more economic arbitration proceeding, without more, does not make a contract adhesive. *Id.* at  
26 711-12.

27 None of the three agreements that Plaintiff signed were adhesive under this standard. All  
28 were customized letter agreements personally addressed and tailored to her, not standard forms.

1 Certain provisions were clearly personalized for Plaintiff's personal situation. When the  
2 agreement is personalized in this way, it is not an adhesion contract. *Semcken v. Genesis Medical*  
3 *Interventional, Inc.* (N.D. Cal. 2004) 2004 U.S. Dist. LEXIS 20380, at 9-12, *aff'd* (9th Cir. 2005)  
4 2205 U.S. App. LEXIS 9252 (decided under California law). Plaintiff had ample time to review  
5 these agreements before signing them. She was free to negotiate any and all of their terms, and  
6 did so as to some of them. Plaintiff was employed elsewhere when she came to work for Elan in  
7 June 2010. Baxter-Simons Decl. ¶ 3. The November 2010 Agreement resulted from Plaintiff's  
8 request for full-time work. *Id.* ¶ 5. Elan was willing to negotiate the arbitration provisions, if  
9 Plaintiff wished. *Id.* ¶ 9. Plaintiff could have refused to sign the Release and simply kept her  
10 potential wage claims, without any repercussion. Shepard Decl. ¶ 4.

11 **b. There Was No Element of Surprise In The Agreements.**

12 Plaintiff cannot claim surprise at learning that there are arbitration provisions in the three  
13 agreements she signed. Each of those agreements is short and set forth in clear type and plain  
14 language. The Release is only two pages long. The arbitration provisions in all three agreements  
15 are marked with underlined headers. In the June 2010 and November 2010 Agreements, the  
16 arbitration provision is the last paragraph before the parties' signatures. The prominence of a  
17 provision in a short agreement minimizes the element of "surprise." See *Roman v. Superior*  
18 *Court* (2009) 172 Cal.App.4th 1462, 1470-71 (no surprise found in seven-page agreement). See  
19 *also Woodside Homes of California, Inc. v. Superior Court* (2003) 107 Cal.App.4th 723, 730  
20 (when there is no "surprise," only a low level of procedural unconscionability exists).

21 **c. There Was No Oppression In The Parties' Negotiations.**

22 Finally, there is no evidence of "oppression" in connection with any of the parties' three  
23 agreements. Plaintiff was not pressured or coerced into signing any of the arbitration agreements.  
24 She had other employment when she signed the June 2010 Agreement and negotiated the terms of  
25 her new employment with Elan. She initiated the November 2010 Agreement by requesting that  
26 Elan increase her hours from part time to full time. The fact that Elan agreed to Plaintiff's request  
27 demonstrates that she had negotiating power at the time the agreement was signed. In connection  
28 with the Release, Plaintiff could have kept her potential claims and pursued them, could accept

1 Elan's offer, or negotiated different terms. Plaintiff cannot show that the arbitration agreements  
2 were procedurally unconscionable.

3 **CONCLUSION**

4 The parties entered into three enforceable agreements to arbitrate all claims arising from  
5 Plaintiff's employment or the termination of that employment. Each agreement was negotiated  
6 and entered into freely and voluntarily, and each provides for all the substantive and procedural  
7 safeguards that California law requires for mandatory binding arbitration of employment disputes.  
8 For the foregoing reasons, Defendants respectfully ask this Court to grant their petition and order  
9 this matter to arbitration.

10  
11 Dated: February 28, 2013

LAW OFFICES OF MARGARET E. MURRAY

*Margaret E. Murray*

12  
13 Margaret E. Murray  
14 Attorneys for Defendants Elan Household, LLC  
15 and Laura Baxter-Simons  
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